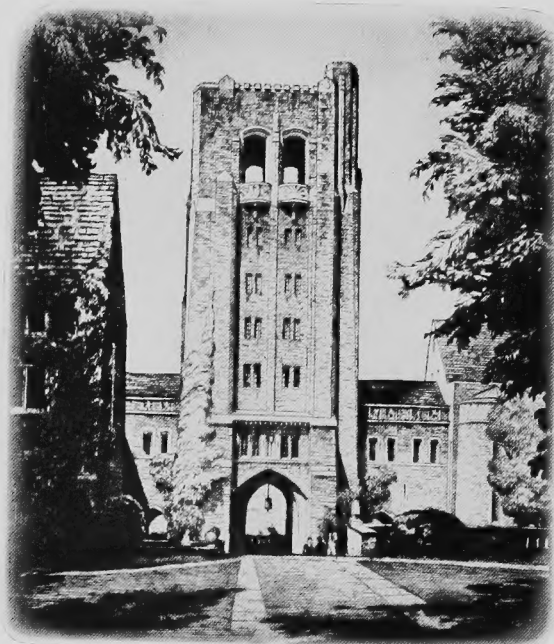


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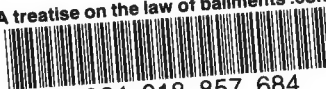
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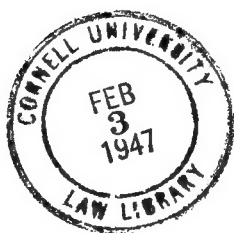
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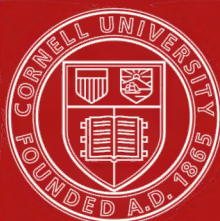
A treatise on the law of bailments :cont



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A TREATISE
ON THE
LAW OF BAILMENTS,
CONTRACTS CONNECTED WITH
THE CUSTODY AND POSSESSION
OF
PERSONAL PROPERTY.

BY ISAAC EDWARDS, LL. D.

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TREATISE

ON THE

LAW OF BAILMENTS.

CHAPTER I.

ON BAILMENTS.

§ 1. THE delivery of goods in trust for a specific purpose, termed a bailment, is a species of contract frequently implied by law. The contract results from the delivery of the goods for a particular use or purpose. According to Mr. Justice Blackstone, "Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee."¹ According to Sir William Jones, it is "a delivery of goods in trust on a contract, expressed or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed."² This definition, accurate so far as most kinds of bailment are concerned, has been criticised as defective, because it does not include chattels delivered for sale, or under such circumstances that a return of them is not contemplated. Indeed, it is not easy to express in a single sentence all those conditions, and those only which accompany every case of bailment. Mr. Justice Story defines bailment as "a delivery of things in trust for some special object or purpose and upon a contract, express or implied, to conform to the object or purpose of the trust."³

On the other hand, Kent gives this definition: Bailment is a delivery of goods in trust, upon a contract expressed or implied that the trust

¹ 2 Black. Comm. 452.

² Jones on Bailm. 117.

³ Story on Bailm. § 2.

shall be duly executed and the goods restored by the bailee as soon as the purpose of the bailment shall be answered.¹

§ 2. These definitions agree in nearly all essential particulars, and disagree in two or three respects. Jones and Kent assume that the property is to be returned, while Blackstone and Story include contracts under which no such return is contemplated. This is not merely a difference in the form of expressing the same meaning. Story intends to include among contracts of bailment a delivery of goods for sale; and Kent intentionally limits his definition so as to exclude that species of contract.

A delivery of merchandise to a factor for sale constitutes the relation of principal and agent; but the right of the principal to prescribe the terms and time of the sale gives to the contract, expressed or implied, between the parties, the elements of at least one species of bailment. If the owner directs the factor to hold the goods until further orders, the relation of the parties thereupon arising can hardly be distinguished from the relation subsisting between bailor and bailee.² There are also instances of the delivery of goods under a commission, not to speak of the delivery of goods to a carrier for a purchaser residing at a distance, in which a return of the property is not contemplated.³

A perfect definition ought to include everything essential in every contract of bailment, and should exclude everything which is not essential. Among other things, it should contain a description of the kind of property which may be the subject matter of the contract. In general terms, it may be said that the delivery of goods or any other species of personal estate for use, keeping or on some other trust, where the general property does not pass, creates a bailment. A delivery of chattels upon a sale made on condition that the title shall pass on the payment of the purchase money at a future day, is something more than a bailment; it gives the buyer a conditional title.⁴ If the contract gives the buyer a definite credit or a reasonable time within which to pay, it gives him a transferable interest in the chattels until the credit expires, and the property in them as soon as he pays the price.⁵

¹ Kent's Comm. 558.

² Per Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 917, 918; *Morss v. Stone*, 5 Barb. 516. The delivery of a chattel to another under a contract that the latter shall safely keep, and if possible, sell it for the owner before a certain day at not less than a price specified, and if not, should return it in good condition, constitutes a bailment. *Middleton v. Stone*, 111 Pa. St. 589.

³ *Jourdan v. Reed*, 1 Clarke (Iowa), 135; the case of a delivery of gold to be delivered to the bailor's wife.

⁴ *Hasbrouck v. Lounsbury*, 26 N. Y. 598.

⁵ *Bailey v. Colby*, 34 N. H. 29; *Vincent v. Cornell*, 13 Pick. 294. The contract gives

A bailment of choses in action may be created where the title passes in form to the bailee; ¹ certificates of stock are daily given in pledge by a formal transfer of title—a transfer being the only way in which such property can be delivered. The absolute title, that is, the general property in the stock or in the choses in action, does not pass.²

The contract of bailment is very often implied from the circumstances attending the delivery of the goods. The usual definition assumes that there is a contract, either expressed or implied, in every bailment; and it is clear that the bailee is held bound to the performance of his duties on the theory of contract. There are cases, it must be admitted, in which there is an apparent want of consideration; *e. g.*, where one loans a chattel gratuitously for an indefinite length of time; or where one man accepts the custody of property to keep or to carry without compensation. In reality the contract in each of these cases is *executed* on part of the bailor; he has delivered the property; and it remains *executory* on the part of the bailee. The consideration is valid, though it be not beneficial to the party promising; and the contract having been partly executed is valid, notwithstanding the election given to one of the parties to withdraw from it or to terminate it.³ Hence there is nothing in the circumstance that the gratuitous lender has the right to terminate the agreement and take back his property, or in the fact that the depositary without reward has the right to restore the goods and thus put an end to his liability, to repel the theory of a contract. On the contrary, these rights assume the existence of the contract and grow out of it.⁴

§ 3. Authors of received authority on the subject generally specify five sorts or classes of bailment, which are defined as follows:

1. *Depositum*, that is, a simple delivery or deposit of goods, to be kept and returned without recompense. The depositary is here under but a limited liability, being answerable only for gross neglect. As he receives no reward for the service, the law does not render him responsible for anything more than the ordinary care which he bestows upon his own property of a similar nature.

2. *Mandatum*, or commission, is a species of bailment where the

no title where the goods are delivered on a condition that they are to remain the seller's property till paid for. *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 N. Y. 500; *Cole v. Mann*, 62 N. Y. 1; *Rodney Hunt Machine Co. v. Stewart*, 57 Hun, 545; *Frank v. Batten*, 49 Hun, 91.

¹ *Campbell v. Parker*, 9 Bosw. 322, relates to the pledge of a bond and mortgage.

² *Wilson v. Little*, 2 N. Y. 443.

³ *Rutgers v. Lucet*, 2 John. Cas. 92; *Miller v. Drake*, 1 Caines, Rep. 45, 46; *Giles v. Bradley*, 2 John. Cas. 253, 254; *Towers v. Barrett*, 1 Term Rep. 133.

⁴ *Orsen v. Storms*, 9 Cowen, 687; *Roulston v. McClelland*, 2 E. D. Smith, 60.

bailee receives goods, and without reward undertakes to do some act about them, or simply to carry them. This kind of undertaking does not differ materially from that of the bailee in the case of deposit; the duties and liabilities arising out of it are very similar. The actual entrance upon the work to be performed is the ground of liability, since an executory contract of this nature cannot be enforced, wanting, as it does, the essential ingredient of a consideration promised or received.¹

3. *Commodatum* is the loan or bailment of goods to be used for a certain time and then returned to the owner, and is made for the accommodation of the bailee; as the loan of a horse or carriage, from which the owner derives no benefit.

4. Property delivered in pledge for debt, *pignori acceptum*, is a bailment in the nature of collateral security. The title remains in the pledgor, so that under our statutes it may be levied upon and sold as his property, but after the sale, the pledgee is entitled to the possession of it until the purchaser redeems it from him. At common law, however, goods pawned or pledged are not liable to be taken in execution in an action against the bailor;² and the special property of the pawnee gives him a right of action against the officer who assumes to take them,³ and even against the owner himself who wrongfully attempts to repossess them.⁴ For the purposes of the pledge he acquires a paramount right over the property, and is responsible for ordinary neglect. If he convert the property to his own use, or dispose of it in any manner contrary to the trust, he is liable to the owner for its value.⁵

Goods are delivered in pledge for the mutual benefit of the parties to the contract; and hence the responsibility of the pledgee is the same as that of the bailee for hire. He has an advantage from the security it furnishes him for the payment of his demand, and the owner of the things pledged gains a credit; so that in the eye of the law the parties stand upon an equal footing.

5. A hiring,⁶ termed in the civil law *locatio conductio*, is a bailment of goods always for a reward, and includes the hire of things for use, *locatio rei*; the hire of deposit or storage, *locatio custodie*; hire of labor and services to be performed on the goods delivered, *locatio operis-faciendi*; and hire of carriage, *locatio operis mercium vehendarum*. Hire for use, such as hiring horses and carriage for a journey, is a bailment of prop-

¹ Thorne v. Deas, 4 John. Rep. 84.

² Steif v. Hart, 1 Comst. R. 20, and cases cited by Jewett. J.

³ 5 Binney, 457.

⁴ Mills v. Stewart, 5 Humph. R. 308.

⁵ Jones on Bailm. 121.

⁶ Jones on Bailm. 86; and Story on Bailm. § 8.

erty which renders the bailee responsible for ordinary neglect.¹ The hire of deposit, such as the storage of goods by commission merchants and warehousemen,² concerns the custody, and requires ordinary diligence in the bailee. Innkeepers, from motives of public policy, are held to a much higher responsibility. Where work is to be done on the property, as where cloth is left with a tailor to be made into clothes, or logs at a saw mill to be converted into boards, it is termed a bailment for labor and services, and the bailee is liable for ordinary neglect. In such cases there is an implied contract that the work shall be done in a workmanlike manner. The hire of carriage, or transportation of goods by a common carrier, is such a bailment of goods as renders the bailee liable for them without any neglect, unless the loss be caused by inevitable accident, by public enemies, or by the act of the owner of the property. The policy of the law holds him to a strict accountability, and makes him in effect an insurer of the goods.³

§ 4. The various degrees of liability imposed on the bailee are graduated by the circumstances attending the trust. He that borrows his friend's horses or books, clearly is in honor bound to take vigilant care of them, so that the lender may not suffer by his kindness; and the principle that holds the borrower responsible for even a slight neglect of this duty is confessedly just. Every one readily recognizes it as a natural obligation. (So, where the owner of property deposits it with his neighbor, who receives it into his house or store without pay, and solely as an accommodation, it is plain that, if he take the same care of it as he does of his own goods, nothing more can in fairness be demanded of him. Unless he be guilty of gross neglect, which is morally as well as legally a breach of good faith, he ought not to be responsible for loss.)^t The rule of equity is the rule of law in such a case. Every man is bound under all circumstances to deal honestly, and that is the limit of his responsibility as a mere depositary. Where, however, he voluntarily and officiously proposes to keep the goods of another, there is a sound reason why he should be held to a stricter liability, since by his own act he may have prevented them from being stored in safety. If he press himself into the undertaking, or make an express agreement to keep them safely, he must, in honesty, exercise ordinary prudence in its fulfillment.

When the relation so far changes that both parties derive an advantage from the contract, it is easy to perceive that the liability must change

¹ *Milion v. Salisbury*, 13 J. R. 211.

² *Knapp v. Curtis*, 9 Wend. 60.

³ 12 Mod. 482; *Jones on Bailm.* 108; *Forward v. Pittard*, 1 Term Rep. 27; *Hyde v. The Trent & Mersey Navigation Co.*, 5 Term Rep. 389.

proportionably; as where property is hired to be used, and a compensation is paid for the use. Here there is no inequality between the owner and him who receives the property in trust. The price of the hire balances the use, so that neither owes to the other any special obligation. The contract between them is one of ordinary business, from which both derive a benefit of profit or convenience. In the employment of property received under such circumstances, it is obvious that the hirer can only be held responsible for the use of ordinary care and common prudence in its preservation. It has sometimes been said, that he is bound to the exercise of all imaginable care of goods so received; but the rule does not go so far.¹ If he exercise the common vigilance which the generality of mankind take of their own property, it will protect him from liability. In the absence of an express agreement, the law implies nothing strained or unreasonable; it is satisfied with the usual and ordinary care incident to the custody of another's goods.

In the negotiation for hire, it is presumed that a fair price was given for the use of the thing hired, and that the hirer undertook to keep it with reasonable care. Nothing extraordinary, as to the manner of keeping or using it, can be presumed to have entered into a contract so common.

Property received with a commission or authority to do some act in relation to it, as when one receives money to use in a particular way, imposes the palpable and plain duty of faithfully executing the trust. Though no compensation be paid for the service, the commission must be faithfully executed, and the person undertaking it is understood to stipulate that he will exercise the necessary labor and skill in its execution. Receiving no recompense, if he undertake and execute the trust in good faith, he cannot be held responsible for the issue of the business. He must act with prudence, doing nothing by which his employer may suffer damage, and omitting to do nothing which the nature of the act requires.² The profession or business of the employee, it is true, may sometimes affect his liability.

One who takes property in pledge for a loan of money or a debt due, as well as he who receives it with the view of bestowing labor upon it

¹ Jones on Bailm. 86, speaks of the rule with his usual neatness of phrase as established by the harmonious consent of nations.

² Jones on Bailm. 53. If one, with whom money has been left to be paid over to a third person on his leaving certain instructions for the benefit of the bailor, exercises the care and prudence that would be exercised ordinarily by a careful business man before paying over the money, he fulfills his legal obligations to the bailor. *Cannon River Manuf's. Assoc. v. Faribault Bank*, 37 Minn. 394. In case of gratuitous bailments the bailee is liable only when chargeable with gross neglect. *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263.

in order to make it more valuable, assumes the responsibility of keeping it safely. The ground of liability in each case seems to be the trust reposed in the person who receives the property. The manufacturer receiving wool to be converted into cloth, upon an agreement for compensation, retains a lien upon the goods until it is paid. The custody is equally for the benefit of both parties. So also in the case of pledging; the contract is one of reciprocal advantage. The debt perhaps is contracted on the understanding that the property shall be taken in pledge for its payment; or the debt being due, its payment is postponed on the receipt of the pledge. The one party gains a credit and the other security by the contract. The principle of liability is therefore the same as in a hiring for use, and the bailee is responsible for ordinary care, and for every departure from the terms of the agreement. It is also a rule of law, as well as of common equity, that whatever is accessary to the thing pledged shall accrue or be applied to the benefit of the owner; if it be a bond and mortgage, the interest growing due on them shall be credited to him on the debt for which they are in pledge.

The common carrier's liability, grounded on the hire he receives, is extended by the policy of the law much beyond that of an ordinary bailee. His agreement to carry and deliver the goods at the place of destination may be discharged without performance only in three instances, namely, when they are destroyed by the act of God, by public enemies, or by the conduct of the owner himself. The reason of this rule, it is said, is the public employment exercised by the carrier, and the danger of his combining with robbers, to the infinite injury of commerce and extreme inconvenience of society.¹

The difficulty of following the property, and in case of loss establishing by evidence the liability of the carrier, seems to be the true ground of the rule; especially since it matters little what principle prevails, so long as the parties to the contract made their agreement with reference to it. The added liability of an insurer, being perfectly understood, is taken into the account in fixing the price of transportation; thus in fact the law is stringent in its requirements and at the same time just. It is made the interest of the person having the custody of the goods to keep and convey them safely, so that the carrier, on whom rests the duty, has the interest in and the means of carrying them safely to the place of delivery. No other principle, it may be safely asserted, would so completely unite commercial convenience and economy with the strict demands of private justice.

¹ Jones on Bailm. 107; *Forward v. Pittard*, 1 Term R. 27; *Hollister v. Nowlen*, 19 Wend. 234, 238.

The common carrier is by virtue of his occupation a servant of the public, whose duties and responsibilities are regulated with a view to the promotion of the interests which he serves, and are founded upon universal rules of commercial policy. These rules, that have grown up out of usages and customs handed down from the rudest periods, have been corrected and qualified by the experience and wisdom of each succeeding age, so as to form at the present time a singularly consistent system of law.

Innkeepers are in like manner and to a like extent liable for the goods of guests stopping with them. In the usual language of the books they are insurers of the property, and nothing but the act of God or public enemies will excuse a loss.¹ In consideration of exercising the public business of innkeepers, they are bound to receive and entertain strangers and travelers, and answer for their goods. In part requital of this unusual liability, the landlord has a lien on the goods for his reasonable charges. The relation of landlord and guest, however, must exist before either the lien or liability can arise.² Indeed, the lien and liability are coincident, the one supporting the other, and both standing and falling together. The extraordinary responsibility of an innkeeper, like that of a common carrier, is based on a principle of public policy, sustained by motives of general utility. The stranger cannot be supposed to have at his command the means of showing the precise negligence by which his goods may have been lost. He is compelled to trust to the care of others, without having the means of ascertaining personally the prudence and care of those to whom he confides his property. And hence the law wisely casts upon the landlord the burden of answering for the loss against which he has the best means of providing. The presumptions of the law are thrown against him, in order that his interest may stimulate his vigilance in the safe keeping of property committed to his custody.)

While there is no injustice in this rule, since the innkeeper carries on his business with a perfect knowledge of his liability, there is at the same time the highest public convenience. The exhausted traveler sleeps in security under a watchful care, presided over and enforced by a strict law.

The several degrees of diligence required of the bailee in the care of property intrusted to him under different circumstances, and the kinds of negligence for which he may become liable, require to be carefully

¹ *Grinnell v. Cook*, 3 Hill, 488; *Coskery v. Nagle*, 83 Ga. 696. *Mason v. Thompson*, 9 Pick. 280; *Berkshire Woolen Co. v. Procter*, 7 Cush. 417. This is the rule at common law.

² *Healey v. Gray*, 68 Me. 489.

marked and fixed in appropriate terms. The language of the law must have a uniform standard value, a sort of technical and scientific precision. In ordinary speech, it is sufficient to say that the person having the custody of property must keep it with *diligence*; but it will not suffice in legal reasoning. Its meaning varies and is relaxed or intensified too much, according to notions of responsibility entertained by the person using it. The idea expressed by it is not a fixed quantity, but rather a quality of attention, differing as much as men differ in the care they take of property entrusted to them. It varies also in respect to the object in reference to which it is employed.

§ 5. Stated in affirmative form, these several degrees or measures of diligence commend themselves to universal acceptance; they are the dictates of reason; they rest upon the solid basis of sound morality; and they have been approved and established by a long course of decisions. 1. A mere depositary, who receives into his custody goods or chattels for the owner's accommodation, as an act of favor or friendship, is bound to take the same care of them as he does of his own property of a like kind. A mandatary acting gratuitously is bound to the same rule of diligence. In the absence of any special agreement, the law implies an undertaking by each to keep the property, under ordinary circumstances, with as much care as he does his own. 2. A bailee under a bailment which is mutually beneficial to the parties, is required to use ordinary diligence to preserve the goods entrusted to him; namely, that care which prudent men take of their own property; or that care which reasonable men use in their own business. The law exacts greater diligence from the bailee deriving a benefit from the contract, because his engagement is made in the ordinary course of business. 3. When the bailee alone derives a benefit from the bailment, he is bound to use great vigilance and extraordinary care in the use and safe-keeping of the property. As a borrower, receiving the use of goods or chattels gratuitously, he must preserve and return them with very great care.

§ 6. It is customary to state the rules of liability in a negative form. *E. g.*, it is usual to state the degree of negligence for which bailees, in these several classes of bailment, are liable. As usually stated, these rules stand as follows: 1. A gratuitous depositary of goods is liable for their value, when they are destroyed or lost through his gross negligence; or by his omission or neglect to take the same care of them which he takes of his own property of a similar kind. 2. The bailee for hire, or for some beneficial consideration, is responsible for losses arising through ordinary negligence, or by his omission to take that care of the goods entrusted to him which prudent men take of their own property. 3. The borrower who receives the use of goods gratuitously,

is liable for their loss or injury through slight neglect, or by the failure to use that diligence which very circumspect and thoughtful persons use in preserving their own goods.

§ 7. Does the law recognize these three degrees of negligence? No one denies that there are differing degrees of negligence, or that the law takes notice of them; nor does any one deny the liability of a bailee for slight negligence, where like a borrower he alone is to receive a benefit from the bailment; nor is it denied that the bailee is liable for ordinary negligence, where the bailment is mutually beneficial to the parties; neither does any one deny the liability of a gratuitous bailee for gross negligence. But the classification has been called in question; it has been doubted whether the terms "slight, ordinary and gross negligence" can be usefully applied in practice.¹ It has even been questioned whether there is any intelligible distinction between negligence and gross negligence, on the notion that the addition of the epithet *gross* is mere matter of vituperation which adds nothing to the sense.¹ The justness of these criticisms may well be conceded, so far as they call in question the sufficiency of these terms; since in their ordinary use they are really terms of comparison. In legal language, as in conversation, they are used with implied reference to what the situation calls for—with implied reference to the affirmative duty required under the circumstances.²

They are recognized by a long course of decisions; they are used to express a rule of law constantly administered in our courts; and they are perhaps as definite and certain as the rule itself. An assignment for the benefit of creditors, relieving the assignee or trustee from liability for losses not caused by willful misfeasance or gross negligence, is fraudulent in law; because the law holds the trustee to a higher degree of responsibility, and does recognize the different degrees of negligence. RUGGLES, CH. J.: "These distinctions are sufficiently obvious to the mind in theory; but it must be admitted that their practical application

¹ *Steamboat New World v. King*, 16 How. U. S. 469; *Hinton v. Dibbin*, 2 Adolph & Ellis, N. R. 646; *Perkins v. N. Y. Central R. R. Co.*, 24 N. Y. 207; *Wilson v. Brett*, 11 Mees. & Welsb, 113; *Briggs v. Taylor*, 28 Vt. 185. See *Marks v. Hudson River Bridge Co.*, 103 N. Y. 28, 35, 36; *New York Cent. R. R. Co. v. Lockwood*, 84 U. S. 357.

² *Philadelphia and Reading R. R. Co. v. Derby*, 14 How. U. S. 486; *Storer v. Gowen*, 18 Maine R. 177; *Gill v. General Iron Screw Collier Co.*, Law Rep. 1 C. P. 612; *Kelsey v. Barney*, 12 N. Y. 425, 429; *Whitney v. Lee*, 8 Metcalf, 91. An act which under certain circumstances would be simply negligent, under other circumstances may be grossly negligent. The same act or omission under varying circumstances may constitute different grades of negligence. *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; *Hun v. Cary*, 82 N. Y. 65, 71.

to particular cases is sometimes difficult. They appear, however, to be well established and generally acknowledged; and the clause in the assignment which gives rise to the present controversy seems to have been drawn with reference to their existence and practical operation. The assignee is not exempted from accountability for gross negligence, but is exonerated from the consequences of negligence in any inferior degree."¹

The rules of pleading are often appealed to as good illustrations of the rules and principles of the common law. The old form of declaration in *assumpsit* against a bailee without reward, alleged among other things that the defendant *so* negligently and carelessly conducted himself that through his negligence the goods were lost to the plaintiff. The same allegation was made in an action against a bailee for hire.² The allegation in both of these cases measures the degree of negligence for which the bailee is liable; and it tacitly implies that the bailee is liable whenever he has so carelessly and negligently conducted himself that the goods are lost to the plaintiff or injured to his damage. While therefore the rules of pleading do not in form recognize the different degrees of negligence, they do assume that the law proportions the care required of a bailee to the natural dangers to which the goods are exposed; and they do fairly imply that the bailee is liable for such carelessness as actually results in a loss, where his negligence is the direct and producing cause of the loss or injury.³

§ 8. It is desirable to have these rules of duty and liability imposed by law upon the bailee expressed in terms that convey a uniform and fixed meaning; and yet every one knows that these and similar terms vary in their signification, from different causes. Used by one person, they do not express exactly the same sense as they do when spoken by another. Men differ in their sense of obligation, so that the same word of duty spoken by different persons does not express a fixed meaning, as it does when spoken with reference to a physical law or fact of natural science. The sense of the terms is also modified by the situation or circumstances in regard to which they are spoken. Ordinary care of one kind of property is not the care required of a different species of property: a package of money requires one kind of care, and a span of

¹ *Litchfield v. White*, 3 Sandf. S. C. R. 545; S. C. 7 N. Y. 438. The assignee is chargeable with the care and diligence of a provident owner, and liable for a loss by ordinary negligence. *Matter of Dean*, 86 N. Y. 398.

² *Yates' Pleadings*, 246, 250.

³ The degree of negligence is discussed in *Bissell v. The N. Y. C. R. R. Co.*, 29 Barb. 602, 612; S. C. 22 N. Y. 258, 305; and in *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; and in *Whitney v. Lee*, 8 Met. 91; and in *Foster v. Essex Bank*, 17 Mass. 479.

horses another. In one community the danger of loss from theft may not be very great; while in another, being much greater, it calls for proportionate vigilance. Our banks and safety deposit companies, with which negotiable bonds and securities are left for safe-keeping, build with a view to defend themselves against dangers of this kind; they construct their vaults and employ watchmen to defend themselves against losses by robbery; in some of our cities they even construct a telegraphic wire, so that the burglar unwittingly reports himself and his crime to the headquarters of the police. In other localities, where but few securities of this kind are found, and the crime of burglary is scarcely known, precautionary measures of safety like these are rarely taken; and it would be hardly reasonable to hold the omission to take such measures, proof of negligence.

§ 9. Strictly speaking, the law does not allow neglect of any kind in the execution of a contract.¹ Its rule varies only in respect to the care it exacts under varying circumstances. The borrower must be very circumspect and careful of goods and chattels, the use of which he receives gratuitously. The relation in which he stands makes it appropriate that the law should be construed rigorously against him for his acts of neglect. Having received a favor, it is adjudged a great fault in him to be guilty of even a slight negligence through which the confidence and trust reposed in him are converted into an injury to his friend. In effect these differing degrees of neglect are only so many accents of mildness or severity in which the law, according to the attending circumstances, pronounces the same principle of equity.² Where the contract is one of ordinary business and gainful to both the parties to it, no special care is required, and common prudence will satisfy the rule of liability. And in the case of a naked deposit, without reward, the construction becomes still more favorable to the bailee, whose situation with reference to the goods does not impose upon him the same watchful diligence usually bestowed on property stored for hire. In all cases, indeed, there is an admirable and intimate relation between the duty of

¹ Story on Bailm. § 17.

² In its true and genuine meaning, equity is the soul and spirit of all laws. *Positive* law is construed, and rational law is made by it: in this, equity is synonymous with justice; in that, with the true sense and sound interpretation of the rule. 3 Black. Comm. 429.

A sentence from Hooker is very often quoted as expressing the highest idea of abstract and pure law. "Of law no less can be acknowledged than that her seat is the bosom of God, and her voice the harmony of the world; all things in heaven and on earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power."

the bailee and the consideration he receives as a reward, or as a motive for entering upon the execution of the trust.

The principles embraced in the law of bailments, originally in a great measure derived, like our principles of equity, from the civil law, compose a system of a somewhat complex nature, involving many nice distinctions, and a great variety and extent of interests. Contracts implied by law, manifestly must be modified by the customs and course of trade. Liabilities imposed by public policy, must be enforced with a wise reference to the conservation of the general interest.

Engagements of a voluntary nature, fairly entered upon, are to be carried into effect equitably and in good faith ; and the numerous trusts accompanying the delivery and possession of personal property, modified as they are by the circumstances of each case, and guarded by well defined principles of law, evidently require a high degree of care in their enforcement. On the principle that no man can be wiser than the law, it is evident that only legal reasoning can be of service in its elucidation. The appeal must be constantly made to the reported decisions of the courts, which the great master of English jurisprudence has so happily termed the witnesses of the law. From a fair canvass of these witnesses we shall derive the elements and principles which make up the main body of our laws of bailments.¹

¹ In the infancy of our common law system, judicial decisions rested solely on the oral testimony of *suitors* or *witan*, who bore witness to the judgments which they or their predecessors had pronounced. They remembered and recorded them. In progress of time their judgments were committed to writing as records of court, and to give them greater publicity, they were at length put forth periodically in the shape of reports. Warren's Law Studies, 404. See 31 N. Y. 290, with reference to the construction of a statute.

CHAPTER II.

DEPOSITS: CONTRACTS INVOLVING THE CUSTODY OF PERSONAL PROPERTY.

§ 10. A delivery of goods to be kept and returned without recompense, creates a bailment; it is called a deposit; the distinguishing feature of the contract is that the keeping be gratuitous. Allowing for a certain difference in the circumstances, the engagement of the depositary is the same in substance as that of the mandatary who receives money or goods under a commission; each of them acts gratuitously. He receives no compensation for his services.¹

How then can the parties make or the law imply a valid contract? The law does not imply a promise from a mere moral obligation; nor will it enforce a naked promise, such as a promise without consideration to *become* a mandatary or a depositary.² But when a person actually enters upon the trust and receives the property into his custody, the confidence reposed in him and his undertaking will raise a sufficient consideration.³ After that he is bound to perform his engagement and execute the trust.⁴ It has been strongly urged that an undertaking of this nature cannot be considered a contract; though it is admitted that it imposes an obligation to act fairly and with reasonable diligence.⁵ But the criticism is rather one of form than of substance. The party accepting the trust voluntarily comes under an obligation, and there can be no impropriety of speech in calling such an undertaking a contract.⁶

¹ 2 Kent's Com. 560; Code of Louisiana, art. 2900.

² Edwards v. Davis, 16 John. 281; Thorne v. Deas, 4 John. 84; Ehle v. Judson, 24 Wend. 97.

³ Rutgers v. Lucet, 2 John. Cas. 92.

⁴ Elsee v. Gatwood, 5 Term. R. 143.

⁵ 16 Amer. Jurist, 264-275.

⁶ Wells v. N. Y. C. R. R. Co., 24 N. Y. 181. Although a gratuitous promise to perform some act with respect to the property of another does not bind the promisor, yet if the act is performed the promisor will be liable for any injury resulting from a want of due care. Melbourne v. Louisville & N. R. R. Co., 88 Ala. 443. In some cases it is held that bailments for the benefit of the bailor, such as *depositum* or *mandatum*, are founded upon express contract and require the assent of the bailee to make him

It is a contract so far as it goes. It does not bind the depositary to continue in the custody of the goods for an unlimited time; for he may tender them to the owner, giving him a reasonable opportunity to remove them, and thus terminate his responsibility.¹

The contract of bailment is very often implied by law from the circumstances attending the delivery of the goods. The usual definition assumes that there is a contract, either expressed or implied, in every bailment; and it is clear that the bailee is held bound to the performance of his duties on the theory of contract. There are cases, however, in which it is at least doubtful whether the bailor assumes any legal obligation; *e. g.*, where he loans a chattel gratuitously for an indefinite length of time. His delivery of the property furnishes a valuable consideration for the borrower's promise to use and keep it with the greatest care; but it does not bind the lender. So where a person finds a chattel and takes it into his custody, he assumes the duty of preserving it; but does the law imply a contract between him and the owner? It will probably when the owner comes and receives his property, and thus accepts the benefit of the finder's services.²

Where one person receives and uses valuable property of another for a length of time, with the owner's consent, the law presumes a contract of hiring and not a gratuitous loan of the use. And the rule is not different where the goods are used by the bailee under the belief that he has acquired the title to them by purchase. A gratuity of considerable value is not to be presumed; it is to be proved.³ There being no special agreement, the nature of the property, the relation of the parties to each other and the circumstances, will ordinarily decide the question of fact, whether the goods were delivered and used under a contract of hire, or under a gratuitous bailment.

§ 11. It is to be remembered that only chattels personal or things movable, which are capable of being delivered, can properly be made the subject of a bailment by deposit. These include everything that can be put in motion, and transferred from place to place; all that great class of property which is termed personal estate because it is supposed

responsible. *Heatherington v. Richter*, 31 W. Va. 858. In others it is held that the liability of a bailee for hire is founded on contract, while in the case of a bailee without reward there is no contract, and the bailee is liable only for wrongful conduct. *Schermer v. Neurath*, 54 Md. 491.

¹ *Roulston v. McClelland*, 2 E. D. Smith, 60. If the owner after notice neglects to remove the property, the bailee may place it on storage at the bailor's charge. *Dale v. Brinckerhoff*, 7 Daly, 45.

² *Sheldon v. Sherman*, 42 N. Y. 484, and cases there cited.

³ *Rider v. Union India Rubber Co.*, 5 Bosw. 85; S. C. 28 N. Y. 379. See *Davis v. Gorton*, 16 N. Y. 255; see also, *Cullen v. Lord*, 39 Iowa, 302.

to follow the person.¹ Securities of every kind, promissory notes and bills of exchange, and bonds and mortgages may become the subject of a deposit;² and so may also title deeds or any chose in action. But in the usual course of business these securities are not often made the subject of this kind of bailment; and even where they are deposited, the depositary has generally but a slight control over them. Frequently he has the bare custody of the paper, while the owner retains the legal title to it. *E. g.*, if John Doe, having a draft or note payable to himself or order, delivers it to another person to keep, without indorsing it, the depositary will have simply the custody of the paper.³ So where he delivers without transferring a bond and mortgage, the depositary will not have control of the title.⁴ It follows that the effect of the deposit, as well as the duties incumbent upon the depositary, must depend upon the nature and condition of the security; in other words, upon the extent to which he is entrusted with the property or charged with its preservation. Should the holder of an indorsed note deliver it to a friend to obtain the money on it when it becomes due, it is doubtless his duty to have it duly protested in case it is not paid at maturity.⁵

§ 12. Where money is paid into court or placed in the hands of an officer under an order of the court, the title to the money is not changed, and the duties of the depositary are not created, nor are they precisely defined as in ordinary cases by contract.⁶ The depositary voluntarily accepts the office held by him, and he receives the money in the due course of his official duty; he does not act gratuitously; he is therefore a bailee for hire, and not a mere depositary. His responsibility for the

¹ Because personal property is supposed to follow the person, wills and other dispositions of it must be made according to the law of the testator's domicile at the time of his death. *Parsons v. Lyman*, 20 N. Y. 103, 112; *Moultrie v. Hunt*, 23 N. Y. 394. Money may be the subject of the contract. *Dustan v. Hodgen*, 38 Ill. 352.

² *Rutgers v. Lucet*, 2 John. Cases, 93. An agent receiving a bill of exchange from another, to be credited to his principal in other transactions, or to be returned, is liable for the amount of the bill where the means of paying it passes through his hands.

³ There can be no question on this point; even in the case of a pledge, the paper should be indorsed in order to transfer it. *Nelson v. Wellington*, 5 Bosw. 178, 187.

⁴ The security may be assigned by parol, but a delivery is not a transfer of the title. *Hooker v. Eagle Bank of R.* 30 N. Y. 83, 87.

⁵ It is the duty of a bailee holding the note as collateral security to have it duly protested. *Foot v. Brown*, 2 McLean, 369; *Chitty on Bills*, 365; *Edwards on Bills and Notes*, 494, 495.

⁶ Under the 73d rule of our Supreme Court, the surplus moneys arising on a foreclosure sale must be paid over to the treasurer of the county, to await the further order of the court. See *Parsons v. Travis*, 5 Duer, 650.

money is at least equal to (and it may be greater than) that of a bailee for a reward.¹

When a deposit is made by agreement between parties engaged in litigating the title, the depositary without compensation incurs the usual liability. His contract is that which he makes it in express terms, or that which the law will imply in the absence of an express agreement.² He is an agent of both parties pending the litigation; on the termination of the suit, he holds for the owner in the same fiduciary capacity as an ordinary bailee;³ bound to pay over the money or give some reasonable account of it.⁴

PARTIES.

§ 13. All persons except those who are disabled by law, are capable of contracting. At common law, married women, infants, and persons of unsound or deficient mind, are incapable of binding themselves by contract. Let us consider these exceptions separately, since they stand each upon a distinct ground of reason or public policy.

1. Under the common law, except so far as it is modified by statute, the legal existence of the wife is merged in that of her husband, and they become one person in law; the wife no longer capable of binding herself personally by contract or by covenant. The rule is counted droll and harsh in these modern days, and has gradually yielded to a new theory, under which the doctrine of merger in a marriage is repudiated. The old word *coverture* must therefore be gradually dismissed. At the same time it is but just to remember that the rule had its affirmative, as well as its negative side. The wife's disability was also her shield.⁵

2. Under the earlier enabling acts a married woman might carry on any trade or business on her sole and separate account; she might sell and convey her separate real and personal property or any part of it, and invest the proceeds in her own name; and she might bind herself by any contract or covenant of title in reference to her separate real estate, with the same effect as if she were unmarried.⁶ Applying the same rule of interpretation to the language of the last statute which

¹ *Muzzy v. Shattuck*, 1 Denio, 233; *Supervisors of Albany v. Dorr*, 25 Wend. 440; *S. C.* 7 Hill, 583; *U. States v. Prescott*, 3 How. U. S. R. 578; *Aurentz v. Porter*, 56 Penn. St. 115; 38 Ill. 89.

² *La Farge v. Morgan*, 11 Martin, 462, 522.

³ *Burhans v. Casey*, 4 Sand. S. C. R. 707.

⁴ *Parry v. Roberts*, 3 Adol. & Ellis, 118; *S. C.* 30 Eng. C. L. 75.

⁵ *Wilson v. Burr*, 25 Wend. 386; *Jackson v. Vanderheyden*, 17 John. 167.

⁶ Chap. 90 of Laws of 1860, as amended by Chap. 172 of the Laws of 1862; *Kolls v. DeLeyer*, 41 Barb. 208.

has been applied to the acts of 1848 and 1849, and it will be found that the law almost, but not quite, removed the married woman's disability to contract.¹ She could bind herself by any contract made in the course of her trade or business.² She might purchase real estate on credit and take the title in her own name;³ and she might bind herself for improvements thereon.⁴

The rule under the earlier enabling acts of this State may be stated thus: A married woman might bind herself by contracts made in her separate business or relating to her separate property; and such contracts might be enforced in law or equity the same as if she were unmarried. Her other contracts did not bind her personally, but might be enforced in equity against her separate property, provided her intention to change it was stated in the contract.⁵

The rule was hardly satisfactory; since a married woman carrying on a trade or business might bind herself personally by contracts of purchase or sale, while a married woman who did not thus engage in trade had no such power. The want of uniformity in the rule evidently was not intended; it grew out of the settled principle of construction that binds our courts to limit the effect of a statute modifying the common law to the words of the statute.⁶

Various acts have from time to time been passed conferring additional powers upon married women, until all the disabilities of coverture have been swept away. A married woman may now contract with her husband or any other person to the same extent, with like effect, and in the same form as if unmarried, and she and her separate estate will be liable thereon, whether such contract relates to her separate estate or business or otherwise, and in no case is a charge upon her separate estate necessary. But this does not authorize her to enter into any contract with her husband by which the marriage relation shall be altered or dissolved, or which will relieve him from his liability for her support.⁷

It will be easy to apply these principles to the contract of deposit. Where the common law remains intact, the married woman cannot render herself liable as a depositary. Receiving goods into her custody without consent of her husband, she does not bind either him or her-

¹ *White v. McNett*, 33 N. Y. 371.

² *Owen v. Cawley*, 36 N. Y. 600; *Schmitt v. Costa*, 3 Abb. Pr. N. S. 188.

³ *Knapp v. Smith*, 27 N. Y. 277; *Draper v. Stouvenal*, 35 N. Y. 507.

⁴ *Fowler v. Seaman*, 40 N. Y. 592.

⁵ *Corn. Ex. Ins. Co. v. Babcock*, 42 N. Y. 613.

⁶ *Yale v. Dederer*, 18 N. Y. 265; *S. C.* 22 *id.* 450; *Ballin v. Dillaye*, 37 N. Y. 35.

⁷ Chap. 381 of Laws of 1884, as amended by Chap. 594 of Laws of 1892.

self; but if the goods come into his custody, or if he voluntarily retain them, knowing the purpose for which they were received, he will be responsible for them.¹ This is on the principle that where the circumstances call upon him either to adopt or repudiate her act, it is his duty to act promptly.² Unless he does so, he certainly cannot be in any better position than one who comes into the possession of goods by finding.

The wife often acts as the agent of her husband; but her authority so to act must be shown affirmatively, by direct proof of her authority or by proof of facts and circumstances from which it may be inferred.³ It follows that a delivery to the wife of the bailor is not equivalent to a delivery to him. Where she obtains the goods from a bailee by fraud, an action might formerly be maintained against both husband and wife for the wrong; but this liability would not prevent a recovery by the bailor against the bailee on the contract of bailment.⁴

§ 14. Persons of unsound mind and memory cannot enter into a binding contract. There are four kinds of persons whom the law recognizes as *non compos mentis*, and incapable of contracting: 1. Idiots, who are such from birth by a perpetual infirmity. 2. Those who by sickness, grief, or other accident, wholly lose memory and understanding. 3. Lunatics, who sometimes have, and sometimes have not understanding, and are therefore incapable, so long as the infirmity continues. 4. Lastly, they that for a time deprive themselves by their own vicious acts, of memory and understanding, as they that are drunken.⁵ None of these, while so afflicted, have what is termed discourse of reason. An idiot is one who has not any use of reason, has no understanding to tell his age, who is his father or mother, or what shall be for his profit

¹ Kowing v. Manly, 49 N. Y. 192, and authorities cited in the opinion of the court.

² Berwick v. Dusenberry, 32 How. Pr. 348.

³ 1 Greenl. Ev. § 185; Goodwin v. Kelly, 42 Barb. 194. The consent of the wife to the taking of her husband's property will not prevent a conviction of the wrong-doer for the larceny. The People v. Cole, 43 N. Y., 508.

⁴ Kowing v. Manly, *supra*. The common law liability of the husband for his wife's torts rested upon two distinct grounds, viz., 1, his control over her conduct, and 2, his right of property in the goods acquired by her. Reeves' Domestic Relations, 71, 148; Mathews v. Fiestel, 2 E. D. Smith, 90; Rowe v. Smith, 45 N. Y. 230. In this State a husband is not liable in damages for his wife's wrongful or tortious acts, nor for injuries to person or property or the marital relation caused by the acts of his wife unless such acts were done by his actual coercion or instigation; and such coercion or instigation must be proved like any other fact. Laws of 1890, Chap. 51, § 2. So in this State the husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate, or character on account of wrongful acts of his wife committed without his instigation. Code of Civil Procedure, § 450.

⁵ Stewart v. Lispenard, 26 Wend. 299.

and loss ; for he "is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters."¹ Lunatics are such as occasionally labor under fits of insanity, and can enter into contracts only during lucid intervals. Those who have lost their understanding by calamity, or demented themselves by drunkenness, are regarded as incapable of discharging the ordinary duties of life.

An infant is capable of contracting, but cannot bind himself by contract ; that is to say, the law gives him the personal privilege of repudiating his contract, while it at the same time holds his agreement a sufficient consideration to sustain undertakings made to and with him. As a rule, his contracts are not void, but merely voidable. Until he repudiates them, they remain good. No other person can take advantage of his privilege ; his promises have not in themselves the essence of a contract, that is obligation, yet they constitute a valid consideration for a mutual promise by another ; and also a sufficient consideration for a new promise by the infant, when he shall be capable of making a binding promise.²

In respect to his contracts which remain wholly executory, no action to enforce them can be maintained against an infant ; and even where his contract has been partly performed, the law allows him the privilege of refusing to go on under it.³ In short, he cannot be compelled to perform a contract by virtue of anything contained in the terms of it.⁴ But where he receives and retains the benefits of the contract on coming of age, he cannot escape from its burdens. He is not allowed to affirm it in part, and reject it as to the residue.⁵ If he buys and pays for property, neither law nor equity will suffer him to retain the property and recover back the purchase money.⁶

It is not material here to consider in what cases an infant may bind himself for necessities and the like ; but it is material to bear in mind

¹ 1 Black. Comm. 304.

² *Mason v. Denison*, 15 Wend. 64; *Millard v. Hewlett*, 19 Wend. 301; *Slocum v. Hooker*, 13 Barb. 536; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Anderson v. Soward*, 40 Ohio St. 325; *Ring v. Jamison*, 2 Mo. App. 584.

³ *Whitmarsh v. Hall*, 3 Denio, 375.

⁴ *Medbury v. Watrous*, 7 Hill, 110.

⁵ *Henry v. Root*, 33 N. Y. 526, 536; *Lynde v. Budd*, 2 Paige Ch. R. 191.

⁶ *Bartholomew v. Finnemore*, 17 Barb. 428; *Kitchen v. Lee*, 11 Paige Ch. R. 107; *Walsh v. Powers*, 43 N. Y. 23, 26. An infant who has deposited money with stock-brokers as a margin upon the credit of which he has engaged in a losing speculation in stocks without ever having possession of the stocks may avoid his contract, repudiate his orders, and recover his deposit in full. *Mordecai v. Pearl*, 63 Hun, 553; *Ruchizky v. DeHaven*, 97 Pa. St. 202. But see *Crummey v. Mills*, 40 Hun, 370.

that infants are liable for their tortious acts, such as trespass, assault, and fraud, in the same manner as adults. If an infant purchase goods under fraudulent misrepresentations, a recovery may be had against him in an action of trover;¹ or he may be indicted and punished for obtaining goods on false pretenses.² An action on the contract will not be supported;³ nor can his contract be turned into a tort for the purpose of charging him.⁴ The action, disaffirming the contract, must be founded upon the infant's tortious act; because the law does not hold him liable on the contract, even where it is infected with fraud.⁵

An infant may avoid his contract at any time before and within a reasonable time after he comes of age.⁶ If he hire a horse to go a journey, he engages to use ordinary care and diligence to protect the animal from injury, and to return him at the time agreed upon. A bare neglect to do either will not render him liable on his contract, nor subject him to an action of trespass.⁷ But if he does any willful and positive act which amounts to a disaffirmance of the contract, the owner is entitled to the immediate possession and may maintain an action of trespass against him.⁸ Though no action can be maintained against the infant based on the contract, it is admitted that an action of trover may be maintained against him for a conversion of the property.⁹ The act of conversion by sale, or by appropriating the property to his own use, is a tortious act. A failure by him to pay over money, received by him for a third person, where by the understanding he is not bound to pay over the same money, is not a conversion. It is a breach of contract.¹⁰

¹ *Bullock v. Babcock*, 3 Wend. 391. In this case an infant of twelve years was adjudged liable in an action of trespass, assault, and battery, viz., for shooting the plaintiff, his playfellow, with a bow and arrow. See *Conklin v. Thompson*, 29 Barb. 18; *Scott v. Watson*, 46 Me. 362. And in *Wallace v. Morse*, 5 Hill, 391, an action of tort was maintained against the defendant for obtaining goods of the plaintiff fraudulently, with an intention not to pay for them. See also *Badger v. Phinney*, 15 Mass. 359; *Homer v. Thwing*, 3 Pick. 492; and cases cited in *Eckstein v. Frank*, 1 Daly, 334.

² *The People v. Kendall*, 25 Wend. 399.

³ *Brown v. McCune*, 5 Sand. 224.

⁴ *Robbins v. Mount*, 4 Robertson, 553, 560; *Munger v. Hess*, 28 Barb. 75.

⁵ *Green v. Greenbank*, 2 Marshall, 485; *Price v. Hewitt*, 8 Wels. Hurl. & Gor. 146; *Gilson v. Spear*, 38 Vt. 311; *Hewitt v. Warren*, 10 Hun, 560.

⁶ *Chapin v. Shafer*, 49 N. Y. 407.

⁷ *Eaton v. Hill*, 50 N. H. 235; *Moore v. Eastman*, 1 Hun, 578.

⁸ *Campbell v. Stakes*, 2 Wend. 137. In this case it was held, that the infant disaffirmed the contract by willfully and intentionally injuring the hired horse.

⁹ *Vasse v. Smith*, 6 Cranch, 226, 230; *Baxter v. Bush*, 29 Vt. 465.

¹⁰ *Root v. Stevenson*, 24 Ind. 115. *Walsh v. Powers*, 43 N. Y. 23; was decided on same principle.

As the infant may make, though he cannot bind himself by, a contract, the law will probably imply an undertaking on his part safely to keep and return goods bailed to him, from the circumstances attending the delivery. If he repudiate this implied contract, he certainly cannot afterwards claim to hold the goods under it or to shield himself from liability by appealing to it. Hence he is liable for any positive and tortious injury to the goods, for a conversion of them, or for any act of fraud by which he deprives the owner of his property.¹ A refusal to surrender the goods, or a misappropriation of them is a wrongful act, from the consequences of which the law will not protect him. The invalidity of the contract does not affect the liability of a party for a conversion of the property.²

§ 15. The presumption is always that the person entering into a contract is of sound mind and capable of contracting. The disability must be established by evidence; it is treated as an exception to the general rule, to be established by the party alleging the disability.³

What is unsoundness of mind, such as will render a man incompetent to bind himself by contract? It is not easy to give a precise answer; but it is safe to say that the free consent of a rational mind is necessary to create a contract; a rule which is easily capable of being enforced in respect to all executory contracts,⁴ and in cases where no equity requires a partial or complete enforcement of the agreement.⁵ In strict law, the want of understanding prevents the meeting of minds which is essential to the creation of a binding contract. In many cases the

¹ The principles recognized in analogous cases fully support the text. *Marshall v. Wing*, 50 Maine, 62. He is liable for a trespass though under seven years of age. *Hutching v. Engel*, 17 Wis. 230; *Baxter v. Bush*, 29 Vt. 465. He is even liable on his note, given in a settlement with the mother of his bastard child. *Gavin v. Burton*, 8 Ind. 69.

² *Hall v. Corcoran*, 107 Mass. 251. In this case the hirer of a horse to be driven for pleasure on the Lord's day, was held liable for a conversion of the property notwithstanding the contract was illegal. The horse was let to go to a particular place, and the act of conversion consisted in injuring the horse by driving it to another place.

A person who has become the bailee of goods through a contract entered into with the agent of an undisclosed principal cannot rescind the contract on account of the minority of the bailor, without delivering the goods to him, even if the contract is voidable. *Stiff v. Keith*, 143 Mass. 224.

³ *Jackson v. King*, 4 Cowen, 207; *Fay v. Burditt*, 81 Ind. 433; *McCarty v. Kearnan*, 86 Ill. 291.

⁴ *Rice v. Peet*, 12 John. 503. This was the case of a note held and delivered by an incompetent party under a contract.

⁵ *Ingraham v. Baldwin*, 12 Barb. 9; S. C. 9 N. Y. 45. In this case the defense of lunacy was offered after a mortgage had been foreclosed and the premises sold; and the court held that no one could interpose the defence unless he claimed under the mortgagor.

situation of a lunatic or deranged person is like that of an infant; though incapable of binding himself, he will not be suffered to retain the consideration of an executed contract and at the same time set it aside. This is especially reasonable where the party dealing with him acts fairly and in good faith, and without any knowledge of his infirmity.¹

Mere imbecility or weakness of mind, short of idiocy or derangement, or loss of mind, does not take away a man's capacity to contract.² The rule is one of necessity; it is founded on the extreme difficulty of prescribing any other rule defining the strength of mind requisite for the transaction of business. To say that a man of very weak mind cannot bind himself by contract, would raise endless issues of fact and practically take away from such persons the means of self-support.³

Certain rules of evidence favor the impression that the law requires a higher degree of capacity to bind one's self by contract than it does to make a valid disposition of property by will. For example, all transfers of property and all contracts made by a lunatic or by a confirmed inebriate after the finding of an inquisition declaring his incompetency are void:⁴ but the inquisition is not conclusive evidence of his incapacity to make a will.⁵ The courts give effect to the inquisition with a view to accomplish the intent of the statute; so that the rule of

¹ Loomis v. Spencer, 2 Paige's Ch. 153; Molton v. Camroux, 4 Exch. 17; S. C. 2 Exch. 487; Baxter v. Earl of Portsmouth, 5 B. & C. 170; 7 Dow. & Ry. 614. A contract with a person not known to be of unsound mind, and who has not been found upon a commission *de lunatico inquirendo* to be insane, may be sustained if it shall have been proven to have been fairly made and without advantage being taken of the lunatic. But neither money advanced, nor compensation for services rendered, to a lunatic can be recovered from him, if the circumstances were such as to put the party upon inquiry as to his mental condition. Matter of Beckwith, 3 Hun, 443; Lincoln v. Buckmaster, 32 Vt. 52; Mutual Life Ins. Co. v. Hunt, 14 Hun, 169; 79 N. Y. 541; Matthiessen & W. R. Co. v. McMahon, 38 N. J. L. 537; Lancaster County Bank v. Moore, 78 Pa. St. 407; Behrens v. McKenzie, 23 Iowa, 333; Wilder v. Weakley, 34 Ind. 181.

² Odell v. Buck, 21 Wend. 142; Jackson v. King, 4 Cowen, 207. Second childhood; Matter of Barker, 2 John. Ch. 232. Monomania connected with the disposition or management of property; Matter of Russell, 1 Barb. Ch. 38. Imbecility from epilepsy; Ridgway v. Darwin, 8 Ves. 65.

³ Sprague v. Duel, Clarke, 90; S. C. 11 Paige Ch. 480.

⁴ L'Amoureux v. Crosby, 2 Paige's Ch. R. 422; Wadsworth v. Sharpsteen, 8 N. Y. 388; Leonard v. Leonard, 14 Pick. 280; Carter v. Beckwith, 128 N. Y. 312; Hughes v. Jones, 116 N. Y. 67. Contracts made before office found, but within a period overreached by the finding of the jury, are not utterly void, but are presumed to be so until capacity to contract is shown by satisfactory evidence. Hughes v. Jones, 116 N. Y. 67; Van Deusen v. Sweet, 51 N. Y. 378; Banker v. Banker, 63 N. Y. 409.

⁵ Leonard v. Leonard, 14 Pick. 284; Breed v. Pratt, 18 Pick. 116.

evidence annulling such subsequent contracts springs from the spirit of the statute. The presumption of a want of capacity to make a will, arising from the fact that a man is under the guardianship of the court, remains; and it is perhaps overcome where the court modifies the commission for the purpose of enabling him to execute a will.¹

In truth, the rule of law does not vary with reference to the subject matter of the transaction. A person of unsound mind can neither bind himself by contract, nor make a will. Our law does not distinguish between different degrees of intelligence or mental capacity. By the statute a man of sound mind and memory may dispose of his property by will;² he has a sound mind when he is able to comprehend the situation of his property, his natural relations, and the nature of his act; he has a sound memory when he is able to collect in his mind, without prompting, the elements of the business to be transacted, and form some rational judgment in relation to them.³

§ 16. A man who is so intoxicated that he is deprived of the use of his reason and understanding, cannot bind himself by contract; he has no legal capacity.⁴ Partial intoxication, where there is no fraud or undue influence practiced, does not render him incompetent; he may make a contract or a will unless he be so far under the influence of intoxicating liquor as to disorder his faculties and pervert his judgment.⁵ Where a person takes advantage of an intoxicated man and obtains a contract from him by artful and fraudulent dealing, a court of equity will grant relief; and a defense may be interposed in an action at law, grounded on the fraud.⁶ By retaining the benefits arising from the contract, as where a drunken man purchases goods and keeps them after he becomes sober, he renders himself liable on the contract.

§ 17. When goods come into the possession of one who has no capacity to contract, it has been argued that the law will raise or imply a duty or contract from the circumstances.⁷ Without attempting to

¹ In the Matter of Burr, 2 Barb. Ch. R. 208; in the Matter of Patterson, 4 How. Pr. 34; Lewis v. Jones, 50 Barb. 653.

² Blanchard v. Nestle, 3 Denio, 37; Stewart's Exr. v. Lispenard, 26 Wend. 255.

³ Delafield v. Parish, 25 N. Y. 9, 66, 97; Van Guysling v. Van Kuren, 35 N. Y. 70; Clapp v. Fullerton, 34 N. Y. 190; Tyler v. Gardner, 35 N. Y. 559; Bannister v. Jackson, 46 N. J. Eq. 593; Clifton v. Clifton, 47 N. J. Eq. 227. What is derangement? See Haviland v. Hayes, 37 N. Y. 25; and Seaman's Friend Society v. Hopper, 33 N. Y. 619.

⁴ Gore v. Gibson, 13 Mees. & Wels. 623; Prentice v. Achone, 2 Paige, 30.

⁵ Peck v. Cary, 27 N. Y. 9, 20; Burns v. O'Rourke, 5 Robt. 649.

⁶ Hutchinson v. Brown, Clarke's Ch. R. 408, 420; Dane v. Kirkwell, 8 C. & P. 679. The contract of a drunken man is voidable; it is not void. Mathews v. Baxter, L. R. 8 Ex. 133; Carpenter v. Rodgers, 61 Mich. 384.

⁷ Per Pollock, C. B. 13 Mees. & Wels. 625.

resolve this point, we may reasonably assume that the law will deal with him as it does in the case of an executed contract; it will not suffer him to interpose his disability as a cloak for misconduct. If he repudiates the implied contract ordinarily raised by law, the owner may at once recover his goods; the right of possession follows the title, and where the custody of the property has been parted with through misapprehension, it may be retaken.

A lunatic, though incapable of committing the moral wrong of trespass, is nevertheless answerable in his estate for the injury he commits.¹ Under the statute which gives damages recoverable in the name of the executor or administrator of the deceased, for the destruction of life through carelessness or by any wrongful act, a lunatic has been held responsible. The decision was made at a General Term of the Supreme Court at Albany, and is supported by many other cases adjudged upon the same principle. The law in such cases demands of the lunatic only the actual damages, to be satisfied out of his estate.²

On the same principle, an insane man is liable for his wrongful and tortious acts of injury to the property of other persons. He is liable like an infant.³

§ 18. *The Finder.* The finder of personal property is not compelled by law to take the same into his custody; but if he voluntarily assume the charge of it, the law imposes upon him the duties of a depository.⁴ The action of trover, so long in use, was designed expressly for the recovery of property by the owner from the custody of the person, into whose hands it may have lawfully come, as by finding, the important fact in the case being the act of conversion; that is, the exercise of some act of ownership or control over the property in exclusion of the legal owner. In that form of suit, in general, only the two questions of title and conversion are litigated. A careful examination, however, of the decisions in the action of trover will show that the finder is, and upon principle ought to be, held responsible for the care of the goods so received. The law, in fact, gives him a special property in them, and he may maintain a suit against any one who shall convert them except

¹ *Morse v. Crawford*, 17 Vt. 499; held liable in trover for strangling an ox bailed to him.

² *Mull v. Kelly*, also *Krone v. Schoonmaker*, 3 Barb. 647. See Session Laws of 1847, ch. 450; also Laws of 1849, ch. 256.

³ *Weaver v. Ward*, Hob. 134; *Cross v. Andrews*, Cro. Eliz. 622. See *Bush v. Pettibone*, 4 N. Y. 300. *Morain v. Devlin*, 132 Mass. 87; *Cross v. Kent*, 32 Md. 581; *Ward v. Conastar*, 4 Baxt. 64; *McIntyre v. Sholty*, 121 Ill. 660.

⁴ Story on Bailm. § 86, 87; *Cory v. Little*, 6 N. Hamp. 213.

the rightful owner;¹ having the right and the means of protecting the property, it is but reasonable that he should be required faithfully to exercise and use them. Where a right is conferred, it is a general principle of both law and equity, that the person or party in whom it is vested shall be required to exercise it in good faith, so as to carry out the purpose for which it is given.²

The action of trover, which always assumes that the property in question came lawfully into the defendant's possession, was frequently brought and sustained for the injury suffered by the misuse, or disposition of it contrary to orders. Every direct act of authority, amounting to an assertion of title, every breach of the express or implied trust on which it was received, and every abuse of the lawful possession, has been repeatedly held a conversion of the property.³ These familiar principles are applicable both to chattels and to choses in action.⁴

§ 19. The finder is in lawful possession against all the world except the owner; he has what the law treats as a special property in the chattel, a title or interest sufficient to enable him to maintain the action of trover against any stranger or third person who takes or detains it from him.⁵ The rule does not apply to the finder of a chose in action;⁶ a mere servant of the owner has no such interest or special property in the goods entrusted to him.⁷ He is not clothed with the rights of a bailee or finder of chattels.

§ 20. Not being legally bound to assume the custody of lost goods or chattels, the question often arises whether the finder is entitled to compensation for his services and expenses when he does take them into his keeping. The rule as usually stated is, that one who takes up an estray or any other lost chattel cannot levy a tax upon it by way of reward or indemnity.⁸ He certainly does not acquire any lien upon it for his services or expenses in taking care of the property. In most

¹ *McLaughlin v. Waite*, 9 Cowen, 670; *Hamaker v. Blanchard*, 90 Pa. St. 377; *Tancil v. Seaton*, 28 Gratt. 601; *Lawrence v. Buck*, 62 Me. 275; *Durfee v. Jones*, 11 R. I. 588.

² *The Mayor, &c., of New York v. Furze*, 3 Hill, 612.

³ *Baldwin v. Cole*, 6 Mod. 212; *McCombie v. Davies*, 6 East, 540; *Roe v. Campbell*, 40 Hun, 49; *McPheters v. Page*, 82 Me. 234.

⁴ *Murray v. Burling*, 10 John. R. 172; 2 Esp. N. P. 190; *Edwards on Bills and Notes*, 2nd ed., 679 a.

⁵ *Amory v. Delamirie*, 1 Strange, 505. The plaintiff, who was a chimney sweeper's boy, found a jewel, and having left it with the defendant, who refused to return it, an action of trover was sustained in favor of the finder.

⁶ *McLaughlin v. Waite*, 9 Cowen, 670.

⁷ *Tuthill v. Wheeler*, 6 Barb. 362, 364. Where a man bargains for property and the title is to vest in him when he pays for it, he cannot bring trover for it against an officer who levies on it as the seller's property until he has paid for it.

⁸ 1 Roll. Abr. 879, C. 5; *Noy's Rep.* 144; *Salk.* 686; *Watts v. Ward*, 1 Oregon, 86.

cases it must be admitted that he performs a meritorious act; but it is a voluntary act of charity or good will; and it is the policy of the law to leave good offices and meritorious acts of benevolence dependent for reward upon the moral duty of gratitude. Hence the law gives no recovery for voluntary services in preserving a neighbor's property from loss by fire or flood.¹ But suppose a chattel is taken up and preserved by the finder at some expense of both time and money, and that the owner afterwards comes and receives it, thereby accepting the benefit of the expenses thus incurred; does the law hold the owner liable for these reasonable expenses? If he choose to abandon his property, it is clear that he is not liable; because the expense was not incurred at his request. But if he accepts the property, preserved and restored to him by these reasonable expenses, he is bound, we think, to reimburse the finder.² It is remarkable that a question of so much practical importance should have remained so unsettled.

A reward being offered to the finder of lost goods or chattels, any one may act upon it and may claim the compensation as a matter of contract; and where by its terms, or by a fair interpretation of the offer, the reward is to be paid on restoring the property, the finder may detain it until the reward is paid.³

Under a statute of this State a person finding horses, cattle or sheep upon his enclosed lands may acquire a lien upon them for his reasonable charges for keeping them, in the manner pointed out in the act. But he cannot do so unless he follows the provisions of the statute.⁴

¹ *Nicholson v. Chapman*, 2 H. Black. 254; *Bartholomew v. Jackson*, 20 John. R., 28; *Watts v. Ward*, 1 Oregon, 86; *Binstead v. Buck*, 2 W. Blackstone, 1117.

² *Reeder v. Anderson*, 4 Dana, 193; *Etter v. Edwards*, 4 Watts, 63; *Amory v. Flynn*, 10 John. R. 102; *Preston v. Neale*, 12 Gray, 222, 223; *Chase v. Corcoran*, 106 Mass. 286. *Sheldon v. Sherman*, 42 Barb. 368; S. C. 42 N. Y. 484. This case justifies the inference that where the owner comes and takes his property benefited by the services of the finder, the law will imply a promise to pay for such services. When is a thing to be considered as lost? Money or chattels, voluntarily laid down and forgotten, are not considered lost in a legal sense, and so it is held that the proprietor of the store, or bank, or place where they are left, is the proper custodian, rather than the party who first discovers them. *State v. McCann*, 19 Mo. 249; *Lawrence v. The State*, 1 Humph. 228; *McAvoy v. Medina*, 11 Allen, 549; *Kincaid v. Eaton*, 98 Mass. 139; *Livermore v. White*, 74 Me. 452. The rule does not hold where a conductor finds money in a railroad car, and the owner cannot be found. *Tatum v. Sharpless*, 6 Phila. 18; N. Y. and Harlem R. Co. v. Haws, 56 N. Y. 175. Or where the bailee of an old safe finds within its lining a roll of bank bills, and the owner cannot be found. *Durfee v. Jones*, 11 R. I. 588; *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. 424.

³ *Wentworth v. Day*, 3 Metc. 352; *Neville v. Kelly*, 12 C. B. N. S. 740; *Baker v. Hoag*, 7 Barb. 113; S. C. 7 N. Y. 555.

⁴ Laws of 1890, Chap. 569, § 120.

§ 21. The finder of a lost article, who takes it into his custody in good faith, not knowing who the owner is, is not rendered guilty of larceny by afterwards secreting and appropriating it to his own use. The taking must be felonious in order to make the act a felony; the taking must be a trespass;¹ and it must be with an intent to steal, *animo furandi*.² The discrimination between the act of taking up a lost pocket-book containing money with an intent to appropriate it, and the act of taking it up and presently concealing it with the same intent, is clearly made; the distinction is indeed nicely drawn, to a rather thin edge; and yet it must be admitted that the crime of larceny is plainly distinguishable from the fraudulent concealment and conversion of property that comes lawfully into a man's possession. The finder of a pocket-book containing bank bills and having the owner's name legibly written in it is a thief, if he conceals and appropriates the money.³ It is not necessary that he should have lifted it from the ground with a thievish intent.⁴ On the other hand, he is held not guilty of felony, where he takes up the book with the money in it, without finding any mark or name in it to indicate the owner, and afterwards fraudulently conceals the same with a view to convert it to his own use.⁵ It is his duty to take means to find the owner and restore the property; but the law does not punish him as a thief for his failure to fulfill this obligation.

§ 22. Under the old common law, where a ship was lost at sea and the goods or cargo were thrown upon the land, the property was adjudged to the king. The law was afterwards modified under a growing sense of justice, and it was made the duty of the sheriff to seize and keep the property for a year and a day, to await the appearance of the owner. But the goods were not deemed a legal wreck unless they

¹ The People v. Anderson, 14 John, 294. The indictment was for the larceny of a trunk, lost from a stage coach.

² The People v. McGarren, 17 Wend. 459; The State v. Weston, 9 Conn. R. 527; Wilson v. The People, 39 N. Y. 459.

³ The State v. Weston, *supra*; People v. Swan, 1 Park. Cr. R. 9.

The Penal Code provides that a person who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner and restore the property to him, is guilty of larceny. Penal Code, § 539.

⁴ The People v. Call, 1 Denio, 120. In this case the defendant was convicted of the larceny of a promissory note; the note was handed to him to write an indorsement upon it, and he carried it away feloniously. Stealing a receipt is not larceny. The People v. Loomis, 4 Denio, 380. See Florence Sewing Machine Co. v. Warford, 1 Sweeney, 433, 448.

⁵ The People v. Cogdell, 1 Hill, 94; State v. McCann, 19 Mo. 249.

came to land.¹ Under a statute of this State, ships and goods cast upon the land from the sea are taken care of and secured on behalf of the owner, in the name of the people. Unless the property be of a perishable nature, it is made the duty of the sheriff to keep the same for a year; and if no one appear to claim it within that time, it then becomes his duty to sell the property and pay over the proceeds into the treasury of the State, for the benefit of the parties interested. In the case of perishable property, the county judge may at once order it sold and the proceeds retained for the owner.² Under this statute the officer is entitled to a reasonable allowance for his services as salvage, and may detain the property until the same, together with his expenses, are paid. The statute applies only where the property is thrown upon the shore; and though the officer's services are compensated under the name of salvage, they are utterly different and distinct from the services rendered in the saving of a vessel or goods from loss while at sea either by shipwreck, fire or other distress.

§ 23. Salvage is a term of the maritime law; it is the reasonable compensation which that law gives to the salvor, to one who renders effectual services upon the high seas or on the sea-coast, or anywhere within admiralty and maritime jurisdiction, in saving a ship or cargo from impending perils or in recovering them from actual loss; whether such services be rendered in recapturing the vessel, or in recovering it when found derelict at sea, or in raising it, or in taking charge of it with the assent of the master while in distress. The raising of a boat and the saving of its cargo from the river, where the tide ebbs and flows, gives a title to salvage.³ It is a peculiarity of this right to salvage, that it accrues only where the property is in fact saved; and the amount to be allowed is estimated with reference to the extent of the services and the danger incurred, the value of the property saved and the perils from which it has been rescued.⁴ When it accrues, it attaches as a lien upon the property.⁵

It is a general rule founded on motives of public policy that no one on board the vessel can become a salvor or entitled to compensation in the nature of salvage; because it is the duty of all on board to stand by the ship and assist it through all perils. A partial exception to the rule is allowed in favor of the seamen; when they render valuable services in saving portions of the vessel and cargo they are entitled to

¹ 1 Black. Com. 290-294.

² Laws of 1890, Chap. 569, §§ 137-150.

³ Baker v. Hoag, 7 N. Y. 3 Seld. 555; 3 Kent's Com. 245.

⁴ Clarke v. The Brig Dodge Healy, 4 Wash. C. C. 651; 3 Kent's Com. 245.

⁵ Hartford v. Jones, 1 Ld. Raym. 393; Hand v. The Elvira, Gilpin, 60.

wages, though not due by the terms of their contract, from the proceeds of the property saved.¹

§ 24. *The Consideration.* In every contract there must be a valid consideration on which the express or implied undertaking rests, as upon a necessary support; a naked promise being in itself simply void, *nudum pactum*. The general rule is that to make a contract or agreement obligatory, the consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made; otherwise there is no agreement that can be enforced. Thus, for example, mutual promises support each other, the receipt of money for the use of another raises and supports the promise to pay it over, and services performed render good the promise of payment therefor.² The act of entrusting a thing with another, and his undertaking the care of it, the law considers a sufficient consideration for his faithful discharge of the trust. The custody of the property is parted with on the faith of the owner in the integrity and care of the person to whom it is delivered; and though he engages to keep it gratuitously he is responsible for a faithful execution of the trust reposed in him, on the ground that his failure to keep the promise made, or the undertaking implied by law, works an injury or prejudice to the party with whom the agreement is made. The maxim *ex nudo pacto non oritur actio*, borrowed from the civil law, does not apply in this case; for there is an act, promise or undertaking, by each of the parties to the contract, sufficient to render it valid and binding.

§ 25. *Sheriffs and Receiptors.* A sheriff levying upon goods must use due diligence to keep them safely to satisfy the execution. But he is not an insurer, and is not, like a common carrier, answerable for a loss of the goods by fire, or by accidents of a similar kind. His capacity as an officer is not considered as fixing a more rigorous measure of liability upon him than if he were a private person. He is answerable as a bailee for hire; and is bound for the use of ordinary care and skill in preserving the goods which he seizes under an attachment or levies upon under an execution. The rule is the same whether he takes the goods into his own custody or delivers them into the hands of an agent

¹ *Daniels v. The Atlantic M. Ins. Co.*, 24 N. Y. 447. Salvage is allowed and divided among the owners, officers and crew of the saving ship. *Hawkins v. Avery*, 32 Barb. 551, 556.

² 1 Comyn on Con. 12, 15, 16; Chitty on Contracts, 26, 27; 7 Conn. R. 57; 9 Cowen R. 778; 4 John. R. 235; 2 Black. Comm. 444, 445; *Miller v. Drake*, 1 Caines, 45; *Powell v. Brown*, 3 John. R. 100; *Foster v. Fuller*, 6 Mass. R. 58; *Randle v. Harris*, 6 Yerger R. 508; *Missisquoi Bank v. Sabin*, 48 Vt. 239; *Buckingham v. Ludlum*, 40 N. J. Eq. 422; *Jones v. Binford*, 74 Me. 439.

or servant.¹ And it applies equally to other officers who receive a compensation for their services.²

§ 26. Is the sheriff liable for the goods when they are stolen? It is quite clear that he is not where he holds them under mesne process, as under an attachment to await the judgment of the court, and it appears that he has taken such reasonable care of the property as a prudent man usually takes of his own.³ He is bound to show that he has taken due care of the property⁴—such care as the nature of the goods and the circumstances reasonably call for.⁵ Is the sheriff liable for any greater degree of care where he levies upon goods under an execution? It has been so held, upon the theory that he ought to act with greater vigilance in the execution of final process.⁶ There does not appear to be any good reason for the distinction; the general title does not pass by a levy under an execution, any more than it does by a seizure under an attachment;⁷ in both cases the officer acts under the command of the court, and becomes liable for the safe-keeping of the property; in one case he keeps it to await the judgment and execution, and in the other to await the sale. The only discoverable difference between the two situations is found in the probable length of time during which he may have to hold the goods in custody—a circumstance hardly sufficient to lay the foundation for a different rule of liability.

§ 27. There are some dangers, against which the sheriff is bound to guard the goods in a special manner. He is bound to guard them against waste or removal by the defendant. He is armed with peculiar powers, and his duties are clearly defined.⁸ He makes a levy upon

¹ *Browning v. Hanford*, 5 Hill, 588; S. C. 7 Hill, 120; S. C. 5 Denio, 586; *Moore v. Westervelt*, 21 N. Y. 103; S. C. 27 N. Y. 234; *Wood v. Bodine*, 32 Hun, 354, 356. The sheriff need not at once remove heavy and cumbersome articles, say 50 tons of pig iron; *Scovill v. Root*, 10 Allen, Mass. 414; or a load of coal in a barge; *Moore v. Westervelt*, 21 N. Y. 103.

² The rule was applied to a country treasurer in *Supervisors of Albany Co. v. Dorr*, 25 Wend. 440; in the case of a receiver, in *Knight v. Plymouth*, 3 Atk. 480; and it has been applied in the case of revenue officers and postmasters; *Burke v. Trevitt*, 1 Mason, 96, 101.

³ *Dorman v. Kane*, 5 Allen, Mass. 38; *Harper v. Moffit*, 11 Iowa, 527.

⁴ *Mill v. Gilbreth*, 47 Maine, 320.

⁵ *Briggs v. Taylor*, 35 Vt. 57, 67. Attaching grain in the straw, he is bound to thrash it when that is necessary to preserve it. He is not liable for the natural deterioration of the property—such as spirituous liquors. *Robinson v. Barrows*, 48 Maine, 186.

⁶ *Hartleib v. McLane's Admrs.*, 44 Penn. St. R. 510.

⁷ *Green v. Burke*, 23 Wend. 490, 496–502; *Peck v. Tiffany*, 2 N. Y. 451, 456. The levy does not satisfy the execution. See *Smith v. Orser*, 42 N. Y. 132.

⁸ § 1702 of the Code of Civil Procedure provides how property shall be kept that has been replevied.

them in the manner pointed out by the law;¹ he takes them into his own custody; or failing to do so, he is liable for them to the same extent as if he *had* taken them into his own keeping.² He is also bound to keep the property with a care and skill proportioned to its nature and circumstances. In other words, the rule must be interpreted with reference to the nature and situation of the property and the specific duties imposed upon the officer by law. On this account we find in a leading case the same charge to the jury interpreted by different judges who adopt it, as laying down a different rule of liability;³ at the same time both agree that the sheriff is not bound to any greater vigilance than a prudent man exercises over his own property.⁴

§ 28. After the sheriff has seized the goods under an attachment or made a levy upon them, it is not unusual for him to leave them in the custody of the defendant or deliver them to a third person and take his receipt therefor with a promise to redeliver them when called for. The officer does this upon his own responsibility; the law permits but does not expressly authorize the act; it enforces the receiptor's contract, but refuses to accept or substitute it in the place of the sheriff's liability. The party so receiving and promising to deliver the property to the sheriff, without compensation, is a mere depositary; *prima facie* he is only liable to the same extent as a bailee without hire.⁵ He is liable, however, according to the terms of his contract⁶—to the full extent of his engagement, even where he covenants to return the property or pay the amount due on the execution.⁷

The receiptor, as we said, is bound by the terms of his contract. If he promise to deliver the goods to the sheriff when called for, no suit can be maintained against him until after a demand and refusal to de-

¹ *Glover v. Whittenhall*, 6 Hill, 597.

² See opinions in *Browning v. Hanford*, 5 Denio, 586; although the point in issue was one of evidence merely. See *Jenner v. Joliffe*, 6 John. 9.

³ *Moore v. Westervelt*, 27 N. Y. 234. The sheriff had attached a cargo of coal on board a schooner. The schooner having sunk in a storm at the wharf, the sheriff was sued for the loss; and the judge at circuit charged the jury that, "it was the duty of the sheriff to take such steps for the safety of the coal as a careful, prudent man of good sense and judgment, well acquainted with the condition of the vessel and her location with regard to exposure to storms, and having all the power of the sheriff in the matter, might reasonably have been expected to take, had the coal belonged to himself." Mr. Justice Balcom understood this as laying down the rule of ordinary diligence; Mr. Justice Davies interpreted it as laying down a more strict rule; and both agreed in holding it sufficiently favorable to the plaintiff.

⁴ See further, *Kendall v. Morse*, 43 N. H. 553; *White v. Madison*, 26 N. Y. 117, 126.

⁵ *Brown v. Cook*, 9 John. 361; *Edson v. Weston*, 7 Cowen, 278.

⁶ *Cornell v. Dakin*, 38 N. Y. 253.

⁷ *Acker v. Burrell*, 21 Wend. 605, 607; S. C. 23 Id. 606.

liver; until a demand is made no action can arise, for that is parcel of the contract.¹

§ 29. The receiptor is also bound by the statement of fact contained in the receipt given by him. If that state the value or the ownership of the property, in word or by implication, he will be estopped from denying it.² And because *he* is thus estopped, the sheriff is also when called upon for the proceeds of the property.³ This doctrine of estoppel is founded on a principle of ethics. The rule of law and the reason of it are stated thus: Where a man by his words or conduct causes another to assume or believe the existence of a certain state of facts, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.⁴ Hence the receiptor who accepts the goods from the sheriff as the property of the defendant in the execution, promising to redeliver them, cannot afterwards set up title in himself. His contract as receiptor precludes him from making that defense. By omitting to assert his right of property at the time the levy is made, he throws the sheriff off his guard and perhaps prevents him from levying upon other property to satisfy the execution. He certainly induces that officer to change his previous position.⁵

¹ Brown v. Cook, 9 John. R. 361.

² Dezell v. Odell, 3 Hill, 215; Penobscot Boom Co. v. Wilkins, 27 Maine, 345; Clark v. Gaylord, 24 Ct. 484; Cornell v. Dakin, 38 N. Y. 253.

³ The People v. Reeder, 25 N. Y. 302.

⁴ Pickard v. Sears, 6 Adolph. & Ellis, 469; Thompson v. Blanchard, 4 N. Y. 303, 309. It is not necessary to an equitable estoppel that the party should have designed to mislead. Manuf. & Traders' Bank v. Hazard, 30 N. Y. 226, 230; Sammis v. McLaughlin, 35 N. Y. 647, 651; Gilbert v. Groff, 28 Hun, 50; Blair v. Wait, 69 N. Y. 113; Trustees, etc, v. Smith, 118 N. Y. 634; Continental Nat. Bank v. Nat. Bank of Commonwealth, 50 N. Y. 575; Beebe v. Wilkinson, 30 Minn. 548; Pitcher v. Dove, 99 Ind. 175.

⁵ Dezell v. Odell, 3 Hill, 216; Bursley v. Hamilton, 15 Pick. 40. But see Clark v. Weaver, 17 Hun, 481. It has been held that a person can defend against his receipt for his own property attached on a writ against a corporation having no corporate existence. Halbert v. Soule, 57 Vt. 358. He is only liable to the officer so long as the officer is liable to the attaching creditor or the debtor. Roberts v. Carpenter, 53 Vt. 678. He is not absolutely liable to redeliver attached property. He is a mere bailee of the attaching officer, who can enforce the promise of his bailee to deliver the goods only so far as is necessary to relieve himself from liability to any party interested in the attachment. Wright v. Dawson, 147 Mass. 384. But the receiptor cannot defend upon the ground that the judgment in the action in which the property was attached was fraudulently obtained; Holcomb v. C. N. Nelson Lumber Co., 39 Minn. 342; Bangs v. Beacham, 68 Me. 425; nor upon the ground that the officer attached property of greater value than directed by the writ; Hunter v. Peaks, 74 Me. 363; nor because of irregularities in the commencement of the action in no way prejudicing the receiptor; Stevens v. Bailey, 58 N. H. 564.

§ 30. Neither is the receptor at liberty to set up title in a third person. By accepting the property and promising to redeliver it, he makes himself the sheriff's bailee, and in that capacity he is not allowed to dispute the bailor's title. This is the general rule; and the exceptions to it show how strictly it is enforced. If the property be taken from him by a paramount title, he is discharged.¹ But if he set up title in another person as an excuse for not surrendering the property, he makes himself a party to the controversy and must stand or fall by the title which he asserts.² To escape the burden of the suit, where the property is taken from him by due legal process, he must give the sheriff immediate notice of the proceedings. If he discharges his duty in this respect, there is no reason for holding him bound to defend the title.³

§ 31. Whatever may be the rule of liability applicable to the sheriff, the receptor receiving no compensation for the keeping or storage of the goods, is liable for them as a depositary or bailee without hire. It is clear that his liability cannot extend beyond that of the officer; and it is equally clear that upon principle his responsibility cannot be held exactly commensurate with the sheriff's liability over to the plaintiff in the execution.⁴ He is however bound to take reasonable care of the property under the circumstances. If he give the sheriff his receipt for a store of goods levied on by him, and allows the defendant in the execution to go on and sell them out at retail, he is answerable for the goods. Leaving them under such circumstances to be wasted or sold, is gross negligence.⁵ Even where the goods are sold by weight and have a fixed market value, anthracite coal for example, the receptor is bound to keep and return the very article which he receives; he is not allowed to sell or consume it and then replace it with the same amount and kind of coal.⁶

§ 32. A reasonable use of the property may be in some cases consistent with the receptor's responsibility. For instance, if he receives a steamboat from an officer, seized under an attachment, he discharges

¹ *Edson v. Weston*, 7 Cowen, 278. And see *Healy v. Hutchinson*, 20 Atlantic Rep'r. (N. H.) 332. That a receptor, whose contract is one of bailment and not of indemnity, may relieve himself from liability by proof of title in a third person, see *Mason v. Aldrich*, 36 Minn. 283.

² *Rogers v. Weir*, 34 N. Y. 463, 467; *Brown v. Thayer*, 12 Gray, 1.

³ *Bliven v. Hudson River R. Co.*, 35 Barb. 188; *S. C.* 36 N. Y. 403. This case did not arise between the sheriff and his receptor; but it arose between bailor and bailee, and it affirms the principle stated in the text.

⁴ *Harvey v. Lane*, 12 Wend. 563, 565; *Edson v. Weston*, 7 Cowen, 278, 280.

⁵ *Phillips v. Hall*, 8 Wend. 610.

⁶ *Anthony v. Comstock*, 1 R. I. Rep. 454.

his duty by returning it at the end of the litigation, when called for, in a condition as available for the purposes of the attachment as it was when he received it; notwithstanding it has been run by the owner and altered and repaired. Property of this kind will depreciate as rapidly while lying still, rotting at the wharf, as it will in service; and hence no action accrues against the receptor on account of the use of the boat, or the alterations and repairs made on it, where he returns it in a state and condition as valuable as when he received it, or as valuable as it would have been without any use whatever.¹ There are other kinds of property that could only be preserved by a reasonable use pending the litigation: *e. g.*, milch cows or a span of horses would be injured for the want of use; not to speak of vegetables and fruits, that are liable to decay. To prevent the consequences of this depreciation, our statute directs the sheriff, when so ordered by the court or judge, to sell perishable property seized by him under an attachment, and hold the proceeds in lieu of the property.² In the absence of any statute on the subject, it is the duty of the officer, or of the person taking charge of the property on his behalf, to take reasonable care of it, considering its nature. Under a litigation protracted through a number of years (the case of the steamboat lasted six years), the mode of preserving the property becomes a matter of great moment, and requires considerable latitude in the use of means.³

§ 33. The sheriff levying upon property under an execution, or seizing it under an attachment, acquires a special property or interest in it and has a right to defend the title acquired by him by an answer or by an action, to protect his own interest, or that of the creditor on whose behalf he acts.⁴ Having attached the goods or made his levy, the general property remains in the owner until the sale, and a special property vests in the officer who may defend the same, or maintain an action for its recovery.⁵ If the property be taken from his possession by an action

¹ Hartshorn v. Ives, 4 R. I. 471. Steamboat Massachusetts running on the Long Island Sound; see Alvord v. Davenport, 43 Vt. 30.

² N. Y. Code of Civil Procedure, § 656. To render property "perishable" within the meaning of the statute it must be inherently liable to deterioration and decay. It is not enough to justify an order for sale that the property is liable to depreciate in value because of changes in styles and fashions. Fisk v. Spring, 25 Hun, 367.

³ Davis v. Ainsworth, 14 How. Pr. 346. In this case potatoes were ordered sold as perishable property. As to the effect of the failure of a bank or trust company holding a fund attached, see McBride v. Farmers' Bank of Salem, 28 Barb. 476.

⁴ Rinckey v. Stryker, 28 N. Y. 45. As to the extent of the sheriff's right to sue or defend in aid or defense of his levy under a warrant of attachment, see Anthony v. Wood, 96 N. Y. 180; Thurber v. Blanck, 50 N. Y. 80; Castle v. Lewis, 78 N. Y. 131.

⁵ Thayer v. Willet, 5 Bosw. 344, 357; Giles v. Grover, 6 Bligh. 277; Scott v. Morgan, 94 N. Y. 508, 515.

of replevin and he obtains judgment in the suit, he has a right, and it is his duty to prosecute the sureties in the replevin suit; because the undertaking given by them becomes the equivalent for the property.¹

§ 34. The sheriff is not bound to take the goods into his actual custody; it would be hardly possible for him always to do so.² He may leave them with the defendant, or with any other person, upon such terms as he chooses to make, being himself responsible for them. If the property levied upon consist of live stock, he may hire an agister to keep it; if it consist of merchandise, he may place it in a warehouse for storage; and these contracts are perfectly legal and valid. The question now arises, what rights do these contracts confer upon the officer's bailee? He was formerly regarded as the mere servant of the officer, having no such interests in the property as would enable him to defend it against a stranger.³ He was held responsible for the property under his promise;⁴ and yet because he had no pecuniary interest in it, the courts for a while denied him the right to maintain an action for its recovery.⁵ The rule did not work well. It was found that a duty enforced by law must have its correlative right; that if the law holds the receptor responsible for the property, it must accord to him adequate means of defending it. It is therefore now settled upon principle and authority that he may follow the property, and maintain an action for its recovery against any person who takes it wrongfully from his possession.⁶

§ 35. The receptor ordinarily engages to keep and return the goods when called for by the sheriff. In terms the contract binds him uncon-

¹ Swezey v. Lott, 21 N. Y. 481.

² Smith v. Orser, 42 N. Y. 132. In making a levy under a warrant of attachment upon personal property capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, the sheriff must take the property into actual custody. N. Y. Code of Civil Procedure, § 649; Anthony v. Wood, 96 N. Y. 180. In levying an attachment upon the interest of one member of a firm, the sheriff is bound to seize and safely keep the property though he has some freedom in the choice of the means of doing this. The seizure of the property is a duty, and it is an official act. Cumming v. Brown, 43 N. Y. 511. The firm property is first liable for the firm debts. Eighth Nat. Bank v. Fitch, 49 N. Y. 539. After the levy upon the interest of one or more partners in a firm, the remaining partners may obtain a discharge of the attachment in the manner prescribed by the statute. See N. Y. Code of Civil Procedure, §§ 693-696.

³ Dillenbeck v. Jerome, 7 Cowen, 294, and cases there cited; and Ludden v. Leavitt, 9 Mass. 104.

⁴ Lockwood v. Bull, 1 Cowen, 322.

⁵ His situation was just like that of any other bailee without hire. Faulkner v. Brown, 13 Wend. 63.

⁶ Miller v. Adsit, 16 Wend. 335; Thayer v. Hutchinson, 13 Vt. 504. The receptor is more than an agent. Terwilliger v. Wheeler, 35 Barb. 620.

ditionally; in substance, it binds him to an honest and faithful performance of his engagement as a bailee.¹ He does not undertake to defend the title to the property; and it is quite clear that he will be discharged from his liability to the officer, where the attachment is dissolved or the execution is set aside.²

It is conceded that the receptor may bind himself absolutely to return the property or pay the execution. The sheriff, who may insure the property against loss by fire,³ has a right to stipulate for an undertaking that will be sure to cover his liability. If he insures the property, though not bound to do so, the money realized in case of a loss insured against, will take the place of the property; *i. e.*, it will belong to the plaintiff in the execution. So if he obtains a valid promise from the receptor binding him in spite of all casualties or accident to redeliver the property or pay the amount due on the execution, he is bound to enforce it; the judgment creditor is entitled to the benefit of the contract.⁴ The engagement becomes a new security for the payment of the debt, collectible in the name of the sheriff,⁵—a security that may be enforced notwithstanding the property is lost or destroyed by fire.⁶

§ 36. *General and Special Property.* One who has the title to any valuable thing, has what is legally termed the general, or absolute property in it. There is also what is known in the law as a special, limited, or qualified property. Absolute property in goods draws after it the possession of them as a construction of law, so that if no adverse right of possession is shown, it is presumed to rest with the owner.⁷ A special property arises out of contract with the owner for the temporary use or

¹ Brown v. Cook, 9 John. R. 361; Edson v. Weston, 7 Cowen, 278.

² Butterfield v. Converse, 10 Cushing (Mass.) 317; Grant v. Lyman, 4 Met. 470; Sprague v. Wheetland, 3 Met. 416.

³ White v. Madison, 26 N. Y. 117.

⁴ People v. Reeder, 25 N. Y. 302; Penobscot Boom Co. v. Wilkins, 27 Maine, 345.

⁵ Acker v. Burrall, 21 Wend. 605; S. C. 23 Wend. 606.

⁶ Cornell v. Dakin, 38 N. Y. 253, 259. In *Browning v. Hanford*, 5 Hill, 588, Judges Nelson and Bronson, the majority of the court, interpreted the promise to redeliver the chattels or pay the execution as not binding the receptor any more strictly than his legal duty binds the sheriff. A question of evidence afterwards arose in the same case, viz., as to the effect of the sheriff's return as evidence of a loss by fire; 7 Hill, 120; in the Court of Errors the decision held the sheriff's return *prima facie* evidence only of his official acts. Two senators held that the receipt bound the receptor for the goods unless they were destroyed through the act of God or the public enemies. The case did not necessarily involve that point; and it is impossible to ascertain the opinion entertained upon the question by at least fourteen members of the court.

⁷ 1 Cowen's Trea. 6th ed. 340.

keeping of goods, or by the operation of law, as already mentioned in the case of a levy by a sheriff on execution.¹ Common carriers intrusted with property for conveyance, have a qualified interest in it sufficient to enable them to defend the same against everybody except the rightful owner.² This special property in the carrier arises out of the nature and terms of his contract to carry safely and deliver the goods at the place of destination; and the right of action vesting in him accompanies the possession as an instrument for its defense. A special property is likewise vested in the factor to whom goods are consigned for sale, and the right of action accrues to him as against third persons, even before he has acquired the actual possession of them.³ Commonly, it is true, the possession must accompany the special property in order to raise a right of action in the bailee.⁴ Indeed, the rule is, that in order to give the bailee a right of action, he must have both the possession and a special property in the goods.⁵ But a possession under the owner, as a common bailee, without hire, is enough as against strangers and wrong-doers; where the present right of possession unites with the right of property, either general or special, an action may be maintained.⁶

An action in the nature of trover may be maintained for the conversion of a note, bond or draft, the same as for the conversion of chattels, regard being had to the nature of the security. A sale of a negotiable note, without title, is a conversion, the same as the sale of a chattel;⁷ and the plaintiff may recover *prima facie* the face of the note as damages.⁸ In the action for a bond, the plaintiff need not recite the instrument, or give its date; but he ought to set it forth sufficiently to show its nature and the parties to it.⁹ The situation of the parties, as well as the nature of the securities, is often important in its bearing upon the fact of conversion.¹⁰

The action of trover will lie for the conversion of a given package of bank bills or a bag of coin; and it will lie for the conversion of money, where the amount is definitely ascertained without specific identifica-

¹ Cary v. Houghtaling, 1 Hill, 311; Root v. Chandler, 10 Wend. 110.

² 7 T. R. 12. The carrier has a right of possession against the tortfeasor.

³ Smith v. James, 7 Cow. Rep. 328, and the cases there cited.

⁴ 4 East, 214.

⁵ Faulkner v. Brown, 13 Wend. 63.

⁶ Sutton v. Buck, 2 Taunt. 309.

⁷ Keutgen v. Parks, 2 Sand. 60; Everett v. Coffin, 6 Wend. 603; Murray v. Burling, 10 John. R. 172.

⁸ Decker v. Mathews, 5 Sand. 439; S. C. 12 N. Y. 313.

⁹ Pierson v. Townsend, 2 Hill, 550; Clowes v. Hawley, 12 John. 484.

¹⁰ Gould v. Gould, 35 Barb. 270; Smith v. Maine, 25 Barb. 33.

tion of the coins or bills.¹ No closer identification is required than that which the law calls for in an action for grain or goods.²

§ 37. A mere depositary or gratuitous bailee is said to have a special property in the goods entrusted to him; and it is conceded he may maintain an action to recover their value against any stranger who converts the property, or through whose negligence it is lost or injured.³ He need not have any real or beneficial interest in the goods; his lawful possession as a bailee and his liability on the implied contract for safe keeping give him a right of action.⁴ The finder of a chattel acquires no right of property in it as against the rightful owner, and yet the law enables him to defend it against everybody else by an action of trover; it assumes that he has a special limited or qualified property in it, valid against all the world except the owner.⁵ The receiptor to the sheriff has no direct actual interest in the goods; he has the possession of the goods, and he has contracted to redeliver them; his possession and his liability together enable him to recover against a wrong-doer who injures or takes the property from him without right.⁶

It is clear then that a bailee of goods, a depositary without having any beneficial interest in the goods themselves, does have such a possessory interest in them as will enable him to defend them by an action at law.⁷ It follows that every bailee of goods must have the same right.

A naked prior possession of chattels, where nothing else appears to qualify its character, is enough to establish a right of action in the plaintiff, and put the defendant upon showing by what title he claims to hold them. This is upon the principle that possession, until the contrary appears, is evidence of title which must prevail, until it is overcome by testimony.⁸

The plaintiff, having a special property in the goods, may recover their

¹ *Graves v. Dudley*, 20 N. Y. 76; *Gordon v. Hostetter*, 37 N. Y. 99.

² *Kimberly v. Patchin*, 19 N. Y. 330.

³ *Chamberlain v. West*, 37 Minn. 54.

⁴ *Faulkner v. Brown*, 13 Wend. 63. The plaintiff was the depositary of a roll of leather, which was stolen and afterwards sold to the defendant. *Moran v. Portland*, 35 Maine, 55; plaintiff in this case sued as the depositary of a carpet bag. *Kellogg v. Sweeney*, 1 Lansing, 397; S. C. 46 N. Y. 291; the guest at an inn sued the landlord for the value of a bag of gold coin, the possession of which he held as a mere mandatary.

⁵ *Armory v. Delamirie*, 1 Stra. 505; 3 Salk. 365; *McLaughlin v. Waite*, 9 Cowen, 670; *Hamaker v. Blanchard*, 90 Pa. St. 377; *Tancil v. Seaton*, 28 Gratt. 601; *Lawrence v. Buck*, 62 Me. 275; *Durfee v. Jones*, 11 R. I. 588.

⁶ *Miller v. Adsit*, 16 Wend. 335; *Thayer v. Hutchinson*, 13 Vermont, 504.

⁷ *Rooth v. Wilson*, 1 Barn. & Ald. 59; *Howorth v. Tollemache*, 5 Scott N. R. 332.

⁸ *Duncan v. Spear*, 11 Wend. 54; *Fish v. Scutt*, 21 Barb. 333; *Wickes v. Adirondack Co.*, 2 Hun, 112; *Wiseman v. Lynn*, 36 Ind. 259; *Tremont Coal Co. v. Manly*, 60 Pa. St. 384.

full value against any one but the general owner who wrongfully takes them from his possession ;¹ or against one by whose negligence they are injured or lost.²

§ 38. The general owner of goods, having a present right of possession, may also maintain either trespass or trover against a stranger for an injury or conversion of the property.³ The action may be brought by the bailee or by the general owner; the right to sue is indispensable to enable each to protect his particular interest; and a judgment in an action by the general owner will bar an action by the bailee.⁴

§ 39. With us the form of the action is not now material. Under the common law practice the general owner of goods bailed without reward, as in the case of a gratuitous loan or deposit or mandate, may maintain the action of trespass against a third party for taking them, because he has the constructive possession, or the right to reduce the goods to his actual possession at any time ;⁵ and he cannot maintain that action for his goods, bailed for hire on a definite term which is yet unexpired.⁶ So also the general owner of goods in the hands of a gratuitous bailee has a present right of possession sufficient to enable him to maintain the action of trover against a stranger. In both these common law actions, the plaintiff must have a property in the goods and constructive possession, *i. e.*, a present right of possession.⁷

These rules of procedure, though they appear on a first reading important only to insure a right choice of the action to be brought, do really show the true relation existing between the bailor and bailee. They assume that a gratuitous bailee for an indefinite time has no right or interest in the goods which he can assert against his bailor; that he is lawfully in possession and has such a right or interest in the goods against every one else. It follows that he is not liable to an action for the goods by the owner or by the bailor, until after a demand and

¹ *Alt v. Weidenberg*, 6 Bosw. 176; *Kissam v. Roberts*, *id.* 154; *Spoor v. Holland*, 8 Wend. 445; *Chadwick v. Lamb*, 29 Barb. 518; *Ingersoll v. Van Bokkelin*, 7 Cow. 670, 681; *Heard v. Brewer*, 4 Daly, 136. And see *Allen v. Judson*, 71 N. Y. 77; *Fowler v. Haynes*, 91 N. Y. 346.

² *Kellogg v. Sweeney*, 46 N. Y. 291; S. C. 1 Lansing, 397.

³ *Thorp v. Buelling*, 11 John. R. 285.

⁴ *Greene v. Clarke*, 12 N. Y. 343; *N. J. Steam Nav. Co. v. The Merchants' Bank*, 6 How. U. S. R. 344; *Baird v. Daly*, 57 N. Y. 236.

⁵ *Orser v. Storms*, 9 Cowen, 687; *Ely v. Ehle*, 3 N. Y. 506.

⁶ *Putnam v. Wyley*, 8 John. R. 432.

⁷ *Gordon v. Harper*, 7 Durnford & East, 9; *Nichols v. Bastard*, 2 Crompt. M. & Ros. 659; *Bloxam v. Sanders*, 4 Barn. & Cress. 941; *Ferguson v. Christall*, 5 Bing. 305. It does not follow that the general owner of goods, let on hire for a term, is without a remedy for an injury to his reversionary interest; he has an action on the case therefor. *Mears v. London & S. Western R. Co.*, 11 Com. Bench N. S. 850, 854.

refusal.¹ A borrower for an indefinite time is not liable to an action until after a demand,² unless it appears that he has delivered it to another party without authority;³ or misappropriated it in bad faith.⁴

§ 40. It is necessary to fix the date when an action may be brought against a gratuitous bailee, in order to ascertain the time when the statute of limitations will begin to run against the action. The depositary of goods holds them in trust, subject to the owner's order;⁵ he is not in fault, and therefore no action lies against him until, being called upon for the goods, he refuses to deliver them. The same rule applies to a deposit of money on call; the depositary is not liable to an action until a demand is made therefor and the money refused. The situation is the same as it is where a man deposits money in a bank payable to his order or on his check. A suit cannot be brought until after a refusal to pay on the usual demand; and the statute does not run until the action accrues.⁶

§ 41. Where money is deposited in a bank in the ordinary course of business, it does not raise a contract of bailment. The transaction amounts to a loan without interest, and creates the relation of debtor and creditor; the bank receives the money and undertakes to repay the same on demand at all events. The fund is mingled with other moneys and becomes an absolute debt due from the bank, for which it is liable even though the money be lost without any fault on its part. It is called a deposit; but this word is now used to describe the formal act of delivery to the bank, and does not declare the nature and effect of the transaction.⁷ A deposit in a savings bank has the same effect as an ordinary deposit in other banks. The depositor transfers his money, and takes

¹ *Brown v. Cook*, 9 John. R. 361; *Phelps v. Bostwick*, 22 Barb. 314; *Beardslee v. Richardson*, 11 Wend. 25; *Ross v. Clark*, 27 Mo. 549.

² *Gilbert v. Man. I. Manuf. Co.*, 11 Wend. 625; *Ryerson v. Kauffield*, 13 Hun, 386.

³ *Esmay v. Fanning*, 9 Barb. 176.

⁴ *Pratt v. Bogardus*, 49 Barb. 89, 95. It has been held that a failure to return within the time limited is a conversion. *Clapp v. Nelson*, 12 Texas, 370.

⁵ *Ball v. Liney*, 48 N. Y. 6; *Winkley v. Faye*, 33 N. H. 171.

⁶ *Payne v. Gardiner*, 29 N. Y. 146; S. C. 39 Barb. 634; *Downes v. The Phoenix Bank of Charlestown*, 6 Hill, 297; *Boughton v. Flint*, 74 N. Y. 476; *Howell v. Adams*, 68 N. Y. 314; *Smiley v. Fry*, 100 N. Y. 262; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

⁷ *Commercial Bank of Albany v. Hughes*, 17 Wend. 94, 100; *Carroll v. Cone*, 40 Barb. 220; *Dykers v. The Leather Manuf. Bank*, 11 Paige's Ch. 612; *Marsh v. Oneida Central Bank*, 34 Barb. 299; *Libby v. Hopkins*, 104 U. S. 303; *Phoenix Bank v. Risley*, 111 U. S. 125; *Cragie v. Hadley*, 99 N. Y. 131; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530.

back a promise of repayment with interest from the bank, a chose in action.¹

There is nothing in its nature to prevent a bailment of money. If a parcel of bank bills or a bag of coin be deposited with a bank or with any other person, on a promise to redeliver the specific bills or coin, the transaction creates a bailment; the title does not pass.² It may be, it is often difficult to trace money, either in bills or coin; being identified, the title will be protected the same as the title to goods.³ It is property which may be levied upon by a sheriff, or delivered on a contract of bailment.⁴ The deposit of money on interest or for use is not a bailment; it is intended to pass the title; it creates a debt. It is however in the nature of a deposit, payable when called for; so payable by the terms and substance of the contract.⁵ On this account a deposit is distinguished from a loan of money; the statute of limitations begins to run against a suit on a note, payable on demand, from its date, no actual demand being necessary.⁶ In the case of a deposit, the statute runs from the time when a suit may be brought against the depositary, namely, from the time of the demand and refusal.

§ 42. Where the depositary converts the goods, the owner's action for the conversion accrues at once, and the statute begins to run from that time; as subsequent demand and refusal will not create a new starting-point; or what is the same thing, in effect, a new cause of action.⁷ A refusal to deliver on demand, made after a sale or other disposition of the goods, does not show a conversion of the property; the refusal is evidence of a conversion, and sometimes equivalent to the act itself. At all events, the depositary is entitled to fair play and a reasonable

¹ *Lund v. The Seamen's Bank*, 37 Barb. 129; *Chapman v. White*, 6 N. Y. 412, 417; *Warhus v. Bowery Savings Bank*, 21 N. Y. 543; *People v. Mechanics & Traders' Savings Inst.*, 92 N. Y. 7.

² *Graves v. Dudley*, 20 N. Y. 76, 80; *Draycott v. Piot*, *Croke's Eliz.* 818, 841.

³ *Tradesman's Bank v. Merritt*, 1 Paige, 302; *Mechanics' Bank v. Levy*, 3 Paige, 606; *McBride v. The Farmers' Bank*, 26 N. Y. 450, 456.

⁴ *McBride v. The Farmers' Bank of Salem*, 28 Barb. 476; *Thatcher v. Bank of State of N. Y.*, 5 Sand. 121.

⁵ *The Kingston Bank v. Gay*, 19 Barb. 459; *Adams v. Orange Co. Bank*, 17 Wend. 513, 515; *Lund v. The Seamen's Bank for Savings*, 37 Barb. 129.

⁶ *Howland v. Edmonds*, 24 N. Y. 307; *Wheeler v. Warner*, 47 N. Y. 519. See *Merritt v. Todd*, 23 N. Y. 28; *Herrick v. Woolverton*, 41 N. Y. 581, 591, 596; *McMullen v. Rafferty*, 89 N. Y. 456; *DeLavallette v. Wendt*, 75 N. Y. 579; *Bartholomew v. Seaman*, 25 Hun, 619; *Milne's Appeal*, 99 Pa. St. 483; *Andress's Appeal*, 99 Pa. St. 421; *Mills v. Davis*, 113 N. Y. 243; *Kraft v. Thomas*, 123 Ind. 513; *Jones v. Nicholl*, 82 Cal. 32.

⁷ *Granger v. George*, 5 Barn. & Cress. 149; *Kelsey v. Griswold*, 6 Barb. 436; *Bruce v. Tilson*, 25 N. Y. 194.

opportunity to ascertain the claimant's right of property.¹ An unqualified refusal or an attempt to set up title in a third party, is a conversion;² as where the bailee gives a receipt to a third party for the goods and agrees to hold them to his order.³ But a wrongful act is not to be presumed, even in favor of a long continued possession.

A conversion may be waived by the owner of the goods, so as to preclude him from bringing an action therefor;⁴ but the wrong-doer does not relieve himself from liability by an offer to restore or replace the goods, after an act of conversion.⁵

§ 43. *Rule of Liability.* A gratuitous bailee is bound to take reasonable care of the goods entrusted to him; the same or as much care as he takes of his own property of a like kind; such care as the circumstances and the nature of the property naturally call for.⁶ The same rule applies to the depositary and to the mandatary; the depositary receives the goods to keep gratuitously, until the owner requires them; and the mandatary receives them to carry and deliver or to perform some act in relation to them, without recompense; in each case the bailee assumes an office of friendship and good will, and is bound merely to use a slight degree of diligence. In other words, he is only liable for a loss or injury to the goods resulting from his gross negligence; or what is the same thing, from his omission to use slight diligence. For in the legal sense, a failure to use slight diligence or that care which every man of common sense, however inattentive, takes of his own goods, is considered gross negligence;⁷ these terms being used interchangeably as practically equivalent to each other.

Under the rule as it is usually stated, the depositary of goods, receiving them gratuitously, without any agreement to keep them safely or take any special care of them, is not responsible for their injury or loss unless it happens through his gross neglect or fraud.⁸

¹ Carroll v. Mix, 51 Barb. 212; Ball v. Liney, 48 N. Y. 6; McEntee v. N. Y. S. Co., 45 N. Y. 34.

² Rogers v. Weir, 34 N. Y. 463.

³ Holbrook v. Wight, 24 Wend. 169.

⁴ Stewart v. Drake, 46 N. Y. 449.

⁵ Livermore v. Northrup, 44 N. Y. 107; Anthony v. Comstock, 1 R. I. 454; Wood v. Fales, 24 Penn. St. 246; Brewster v. Silliman, 38 N. Y. 423. New York City v. Lent, 51 Barb. 19; property peculiar; an autograph letter of Geo. Washington.

⁶ Coggs v. Bernard, 2 Ld. Raym. 909; Foster v. The Essex Bank, 17 Mass. 479.

⁷ Tompkins v. Saltmarsh, 14 Serg. & Rawle, 275; Dougherty v. Posegate, 3 Clarke, Iowa, 88; Jones on Bailm. 112.

⁸ McKay v. Hamlin, 40 Miss. 472; Gulladage v. Howard, 23 Ark. 61; Spooner v. Mattoon, 40 Vt. 300; Persch v. Quiggle, 57 Penn. St. 247; Johnson v. Reynolds, 3 Kansas, 257; Hills v. Daniels, 15 La. An. 280; Newhall v. Paige, 10 Gray, 366;

§ 44. It is manifest that the care required must be such as the circumstances and the nature of the property demand; that is to say, in applying the general rule, respect must be had to the situation of the parties and to the particular kind or character of the property which is the subject to the bailment. One who receives a picture, a cartoon for example, is bound to have a care that it be not placed in an exposed situation, as against a damp wall;¹ and one who receives money on deposit must use a degree of diligence and attention adequate to the performance of the trust.² A delivery of money to invest without compensation, would fall within the definition of a naked bailment, and it would certainly create a trust which would call for a high degree of prudence and good sense in its execution; the mandatary would probably be held bound by the rule applicable to an ordinary trustee.³

The nature and value of the deposit, and the circumstances attending the bailment, naturally fix the attention of the bailee, and as naturally indicate the precautions to be taken for the safety of the property. A soldier in camp receiving money from his friend for safe keeping, will spontaneously keep and carry it with a care to prevent its being lost or stolen⁴; the bailee will do the same thing passing through the crowded streets of a city;⁵ or in any casual crowd, so apt to be infested and plundered by well dressed thieves.⁶ Now the law requires from the bailee just these natural precautions, dictated by the situation and circumstances of the bailment: and in applying the established rule of liability, it is the province of the court in each case to remark upon and give due weight to the circumstances of time, place and danger attending the loss.⁷ The reason of the situation materially affects the rule of law; it gives rise to the rule, and it presides over its enforcement.

Dougherty v. Posegate, 3 Clarke, Iowa, 88; *Conwell v. Smith*, 8 Ind. 530; *Edson v. Weston*, 7 Cowen, 278; *Onderkirk v. Central Nat. Bank*, 119 N. Y. 263; *Heatherington v. Richter*, 31 W. Va. 858; *Tancil v. Seaton*, 28 Gratt. 601; *Schermer v. Neurath*, 54 Md. 491; *Davis v. Gay*, 141 Mass. 531; *Carrington v. Ficklin*, 32 Gratt. 670; *Patterson v. McIver*, 90 N. C. 493; *Whitney v. First Nat. Bank*, 55 Vt. 155.

¹ *Mytton v. Cock*, 2 Str. 1099.

² *Jenkins v. Matlow*, 1 Sneed (Tenn.), 248; and *Tracy v. Wood*, 1 Mason, 132.

³ *King v. Talbot*, 50 Barb. 453, 482; S. C. 40 N. Y. 76, 86. A trustee must invest on bond and mortgage or in government funds, or in bonds or stocks of cities of this State issued pursuant to a law of this State. See Laws of 1889, Chap. 65.

⁴ *Spooner v. Mattoon*, 40 Verm. R. 300.

⁵ *The Rendsberg*, 6 Rob. 141, 155.

⁶ *Graves v. Ticknor*, 6 N. H. 537; *Nelson v. McIntosh*, 1 Starkie N. P. 188.

⁷ *Whitney and wife v. Lee*, 8 Metcalf, 91. A promissory note was delivered to a bailee "to secure and take care of it;" held without explanation that this was a bailment merely for safe keeping, and that the bailee was liable only for fraud or gross negligence. CH. J. SHAW: "The law has endeavored to make a distinction in the

§ 45. The depositary must act with perfect fairness, dealing with his friend's goods as he does with his own. Ordinarily this is the true measure of his duty. The owner deposits a box containing gold and negotiable securities in a bank, locked in the usual manner, and the bank places it in its vault where it keeps its own coin and securities, without compensation; here we have a naked bailment, and the bailee is not liable for a loss by theft or by the fraud of its agents or servants; it is not liable because it has exercised the same care of the parcel received on deposit as it took of its own property of the same kind.¹ The depositor understands beforehand the circumstances of danger and safety which invest the vaults of the bank; and he cannot reasonably demand any new precautions for the safety of his property.²

degrees of care and diligence to which different bailees are bound; distinguishing between gross negligence, ordinary negligence, and slight negligence; though it is often difficult to mark the line where the one ends and the other begins. And it must be often left to the jury, upon the nature of the subject matter and the particular circumstances of each case, with suitable remarks by the judge, to say whether the particular case is within the one or the other. Subject to these remarks upon the application of these distinctions, we think it well settled, that a bailee for safe keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith or gross negligence. This rule was settled on great consideration, and after full deliberation, in *Foster v. Essex Bank*, 17 Mass. 479."

¹ *Foster v. Essex Bank*, 17 Mass. 479; *Onderkirk v. Central Nat. Bank*, 119 N. Y. 263, 271; *Caldwell v. Hall*, 60 Miss. 410; *Whitney v. First Nat. Bank*, 55 Vt. 155; *Smith v. First National Bank of Westfield*, 99 Mass. 605. U. S. bonds were enclosed in an envelope and deposited with the bank in its vault in the usual way for safe keeping; not being restored on demand, held that defendant was liable only for want of ordinary care, or for gross negligence; liable for the negligence of its officers or servants, but not liable for their theft. *Mauzy and Osborn v. Coyle*, 34 Md. 235, 247; *Lancaster Co. National Bank v. Smith*, 62 Pa. St. 47; *Glover v. Burbidge*, 27 S. C. 305; *Schermer v. Neurath*, 54 Md. 491.

² Our safety deposit companies are organized for the purpose of insuring to the owner a greater degree of safety. The rule of law is held the same in several States. *Griffith v. Zipperwick*, 28 Ohio St. 388; *Scott v. Bank of Cherry Valley*, 72 Penn. St. 471, 478; *First National Bk. of C. v. Graham*, 79 Penn. St. 106; 19 Amer. R. 122, 181. The act of receiving such security for safe keeping can hardly be considered unauthorized when it is done habitually, with the privity and knowledge of the directors and officers of the bank. *First Nat. Bank of C. v. Graham*, 100 U. S. 699. The right to make the contract and the rule of liability are fully discussed in *First National Bank v. Ocean Nat. Bank*, 60 N. Y. 278, where the recent authorities are cited; and *Wiley v. First Nat. Bank*, 47 Vt. 546. It is now settled that if a bank is accustomed to take special deposits of bonds and stocks, and this is known and acquiesced in by the directors, and the property thus deposited is lost by the gross carelessness of the bank, the bank is liable in like manner as if the deposit had been authorized by its charter. *First Nat. Bank v. Graham*, 100 U. S. 699, 702; *Manhattan Bank v. Walker*, 130 U. S. 267; *Turner v. Bank of Keokuk*, 26 Iowa, 562; *Smith v. Bank of Westfield*,

§ 46. The rule cannot be stated with much precision. Good faith requires of the depositary that he shall take the same care of the goods which he receives on deposit, as he does of his own ; and the law exacts from him at least this measure of diligence. At the same time, it cannot be affirmed that this is the limit of his liability ; because he is answerable for a loss that happens through his gross neglect, and he cannot excuse himself by showing that he has been equally negligent in the care of his own property.¹

§ 47. It has been argued that gross negligence by the bailee in the care of goods is evidence of fraud, and equivalent to it in its effect upon the contract. If by this we are to understand that the bailee is liable for the goods lost or destroyed through either his bad faith or gross negligence, the proposition must be accepted as good law : but if we are to understand by it that gross neglect is the same thing as a violation of good faith, the doctrine cannot be maintained.² In a moral sense gross negligence by the bailee bears a near resemblance to bad faith, because his express or implied engagement binds him to a faithful keeping of the property ; he has assumed an active duty, he is bound to take care of the property. And a failure to do so evinces a want of good faith, or faithfulness in the discharge of duty.³

Under the Roman or civil law gross neglect was treated as equivalent to fraud ; but the common law, under which different branches of the same tribunal pass, one upon the principle, and the other upon the conclusions of fact to be drawn from the evidence in the case, does not pronounce absolutely upon a question which must be solved by inferences.⁴ It does not assume to declare what shall be taken as conclusive evidence of fraud ; in other words, it does not undertake to anticipate and provide against fraud by any specific form of proof. It assumes rather that the fertility of human invention is too great, and the fraudulent devices and schemes of men too complex, to be classified ; it therefore leaves the question of fraud to be solved in each case as one of fact.⁵

99 Mass. 605 ; *Chattahoochee Bank v. Schley*, 58 Ga. 369. A national bank as part of its legitimate business may receive special deposits. *First Nat. Bank v. Graham*, 100 U. S. 699 ; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82 ; *Onderkirk v. Central Nat. Bank*, 119 N. Y. 263.

¹ *Tracy v. Wood*, 3 Mason, 132 ; *Doorman v. Jenkins*, 2 Adol. & Ellis, 256 ; *Rooth v. Wilson*, 1 Barn. & Ald. 59 ; *Rivara v. Ohio*, 3 E. D. Smith, 264 ; *Murray v. Clarke*, 2 Daly, 102.

² See *Hun v. Cary*, 82 N. Y. 65, 72.

³ *Jones on Bailm.* 46 and 120 ; 17 Mass. 479.

⁴ *Tudor v. Lewis*, 3 Met. Ky. 378.

⁵ *Chesterfield v. Jansen*, 2 Ves. Sen. 155 ; *Mortlock v. Buller*, 10 Ves. 306. Fraud is of the nature of crime, and must be affirmatively proved. *Ward v. Center*, 3 John. R.

§ 48. It was at one time held that the delivery of goods to be safely kept does not create any greater liability than a simple deposit without any stipulation; on the authority of Lord Coke, that to keep and to keep safely are one and the same thing. The modern doctrine does not support the rule; it allows the bailee to lessen or enlarge his liability by contract.¹ In a common carrier's contract, a stipulation to carry and deliver "safely and securely" does not enlarge his liability;² in a depositary's contract the engagement to keep safely increases his obligation, though it can hardly be held to bind him absolutely for the safety of the goods. It binds him according to its terms, giving to these a fair and reasonable interpretation.³

The implied contract for the safe keeping of the goods by the depositary, does not render him liable for a loss of them by fire, theft or robbery, unless he has exposed them to such loss by his gross negligence.⁴ Even a bailee for hire is not liable for losses of this nature; he does not assume the risk of the misconduct or tortious acts of third parties.⁵ Hence the owner and not the bailee bears the risk of loss from such extraneous causes.

§ 49. Where a sealed package containing securities or a box containing valuables, and locked, is delivered to a depositary to keep without any information as to their contents, it is his duty to preserve them with reasonable care; such care as prudent men usually take of property locked or sealed up in that way. He would not be required to assume that the package contained bank bills or negotiable notes, or that the box contained jewels, nor to keep the articles with the care with which he would guard that kind of property. He would have a right to

271, 281. Fraud is not treated exactly the same in equity as at common law. *Willard's Eq.* 145, 147.

¹ *Coggs v. Bernard*, 2 *Ld. Raym.* 909-915; *Alexander v. Greene*, 3 *Hill*, 9; *S. C.* 7 *Hill*, 533; *Dorr v. New Jersey Steam Nav. Co.*, 11 *N. Y.* 485, 491.

² *Austin v. Manchester & C. Railway*, 5 *Eng. Law & Eq.* 329; *Collett v. The London & N. Railway Co.*, 6 *Eng. L. & Eq.* 305; *Shaw v. York & N. M. Railway Co.*, 13 *Q. B.* 347; *Ross v. Hill*, 2 *Man. G. & Scott*, 877.

³ 2 *Bl. Comm.* 452; *Ames v. Belden*, 17 *Barb.* 513; *Hyland v. Paul*, 33 *Barb.* 241.

⁴ *Hyland v. Paul*, 33 *Barb.* 241; *Southcote's case*, 4 *Co. Rep.* 83, 84; *Bonoin's case*, *Fitz. Albridge. Detinue*, 59; *Coggs v. Bernard*, *supra*; *Foster v. Essex Bank*, *supra*; *Finacue v. Small*, 1 *Esp. N. P.* 315; *Schmidt v. Blood*, 9 *Wend.* 268; *Monteith v. Bissell*, *Wright*, 411.

⁵ *Ewing v. French*, 1 *Blackford's (Ind.) R.* 353; *Norton v. Woodruff*, 2 *N. Y.* 153. Under an express contract to keep safely, the bailee could hardly be bound to insure the owner against such casualties. See *Worth v. Edmonds*, 52 *Barb.* 40; but he might be liable for loss by negligence; *Webb v. R., W. & O. R. R. Co.*, 49 *N. Y.* 420; and has the right to incur the necessary expenses to insure the safety of the property; *Harter v. Blanchard*, 64 *Barb.* 617.

assume that the box or package contained no greater value than is ordinarily enclosed in that manner; because no bailee can be drawn by artifice into a responsibility greater than he intended to assume.¹

§ 50. The situation and circumstances may be shown as bearing upon the depositary's liability:² can his individual character also be made the subject of judicial investigation? The manner in which his liability is usually stated, assumes that it is material. Kent says, "Such a bailee who receives goods to keep *gratis* is under the least responsibility of any species of trustee. If he keep the goods as he keeps his own, though he keeps his own negligently, he is not answerable for them; for the keeping of them as he keeps his own is an argument of his honesty." Again he says, "If the depositary be an intelligent, sharp, careful man in respect to his own affairs, and the thing entrusted to him be lost by a slight neglect on his part, the better opinion would seem to be that he is then responsible." And Lord Holt is still more emphatic: "If the bailee be an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, by reason whereof the goods deposited are stolen, together with his own, he shall not be charged, because it is the bailor's own folly to trust such an idle fellow."³

So far as the character and habits of the depositary are developed in the transaction, it is well nigh impossible to ignore them; and yet it seems quite clear that the depositary, sued for damages resulting from his gross negligence, would not be allowed to prove as an independent fact that he is habitually a very careless and improvident man, for the purpose of reducing the measure of his liability. For in truth this measure has no reference to his individual character; it looks rather to the general conduct and character of a whole class of persons; it is not so flexible that it can be adjusted to the infirmities of an individual.⁴

¹ Bonoin's case, Fitz. Abr. Detinue, 59; Part IV. Coke R. 83 b, 84 a. A common carrier cannot be entrapped, by the artifice of packing, into liability for very valuable articles under the guise of coarse and inexpensive goods. Warner v. Western T. Co., 5 Robt. 490; Orange Co. Bank v. Brown, 9 Wend. 85, 116. In one sense the depositor of the box of securities does not intrust the securities with the depositary; delivered to a banker they do not become subject to his lien; Brandao v. Barrett, 12 Clark & Finnelly, 787. Under the California Code the liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor or has reason to suppose the thing deposited to be worth. Cal. Civil Code, § 1840.

² Knowles v. Atlantic & St. L. R. R., 38 Maine, 55; Barry v. Marix, 16 La. Ann. R. 248.

³ 2 Kent's Comm. 561, 564.

⁴ Conway Bank v. Amer. Ex. Co. 8 Allen, 512; Morse v. Crawford, 17 Vt. 433; Swann v. Brown, 6 Jones Law N. C. 150.

The depositary's mode and means of keeping or storing like goods may be fairly considered, if known to the bailor at the time of the delivery; and where he knows the place and the manner in which his goods are to be kept, the law may fairly presume his assent in advance that his goods shall be thus treated. Evidence of this kind would be admissible to show either a contract for the keeping of the goods in that manner, or a waiver of any greater degree of diligence in their safe keeping.¹

§ 51. It is laid down as the rule of the civil law that the depositary is bound for a higher degree of diligence where he offers of his own accord to assume the custody of goods; the reason assigned for the rule being, that he thereby possibly prevents them from being placed in more secure hands. Under the Code of Louisiana the usual rule of liability is rigorously enforced, where the deposit is made at the request of the depositary.² Assuming that he acts in good faith, why should his previous offer of service be construed to his disadvantage? A civil motive, an expression of good will, is hardly sufficient to strengthen or intensify a rule of law. On a sudden emergency demanding prompt action, as in the presence of a riot or fire, an offer to receive your neighbor's goods should hardly be discouraged by a rule of law.

§ 52. The natural increase of property accrues to the owner. Dividends upon stocks, the interest upon securities, and the young of domestic animals belong to the owner, and not to the depositary.³ This rule of reason has been applied and enforced in a great variety of cases. It is assumed and acted upon, as we shall find, in all contracts for the hiring of farms on shares;⁴ in contracts for the hire and return of cattle or sheep on shares;⁵ and in contracts involving a pledge of personal property.

§ 53. *A Second Bailment.* The person who has property on deposit, so as to render him liable as a bailee, may enter into a contract of bailment with a third person to whom he may deliver the goods for safe keeping.⁶ But such a contract will not prevent the owner of the goods from following them; he can even, in some instances, maintain trespass against the person who seizes them in the hands of his bailee, who has

¹ Knowles v. Atlantic & St. L. R. R., 38 Maine, 55; and Conway Bank v. Amer. Ex. Co., 8 Allen, 512.

² Code of Louisiana, Art. 2908, 2909.

³ Orser v. Storms, 9 Cowen, 687; the case of the Swanns,—Coke Rep.

⁴ Taylor v. Bradley, 39 N. Y. 129; Wilber v. Sisson, 53 Barb. 258; Caswell v. District, 15 Wend. 379.

⁵ Putman v. Wise, 1 Hill, 234. It is a sale when the hirer agrees to return a certain number, but not the same sheep or cattle. Bartlett v. Wheeler, 44 Barb. 162.

⁶ Armory v. Delamirie, 1 Str. Rep. 505.

no interest or claim to hold the goods coupled with his possession. The rule of law applies here, that the general property draws after it the possession.¹ Not so where the bailee has a special property in the goods as against the owner of them, such as the lien which the master of a vessel has on the cargo for freight. In this case, the delivery of the goods for safe keeping by the master who has a lien on them, is not such a parting with the possession as destroys the lien. Generally, the possession of the mere naked bailee is held in law to be the possession of the depositor; the undertaking of the depositary being gratuitous, may be determined on demand. And where the bailee desires to free himself from the responsibility incident to the contract, he may without doubt do so on his own motion, by restoring the goods to the owner or depositor. Not having stipulated to keep them for any particular length of time, he cannot be compelled to continue an undertaking wholly gratuitous on his part.²

§ 54. *Redelivery.* The rule is that the depositary is bound to redeliver or restore the chattels bailed to the bailor; ³ and the bailor may recover the goods of his bailee without proving his right of property in them; until the goods are seized by the right owner or by some superior title, the depositary is compelled to restore the goods to the person from whom he received them, whose right he cannot controvert.⁴ But if he deliver them to the rightful owner, on demand, he has a good defense against the bailor, since a delivery in such a case is not a matter of choice.⁵

§ 55. To avoid the inconvenience of a double litigation, where there are rival claimants to the property, and an action is brought against the bailee for its detention, the law, in some cases, permits the adverse claimant to be brought into the suit by the process of *garnishment*.⁶ But a much more convenient remedy is furnished in courts of equity by a bill of interpleader, which may be filed where the plaintiff stands in the situation of an innocent stakeholder, against defendants claiming of him the property, fund or duty, by different or separate interests; the object being to protect the complainant against a double litigation, involving also the danger of a double recovery against him. The bill lies only where the complainant is in possession, and claims no interest

¹ Thorp v. Burling, 11 John. Rep. 286.

² Roulston v. McClelland, 2 E. D. Smith, 60.

³ Onderkirk v. Central Nat. Bank, 119 N. Y. 263, 267.

⁴ Roll. Abr. 607; 1 Bac. Ab. 369.

⁵ King v. Richards, 6 Wharton, 418; Scranton v. M. & F. Bank of Rochester, 24 N. Y. 424; Western Transportation Co. v. Barber, 56 N. Y. 544; Hentz v. The Idaho, 93 U. S. 575.

⁶ 2 Kent's Comm. 568.

in the property in dispute.¹ Its accepted definition is: "A bill exhibited, when two or more persons claim the same debt or duty from the complainant, by different or separate interests; and he not knowing to which of the complainants he ought of right to pay or render it, fears that he may be damaged by the defendants (as by paying his money to a wrong hand), and therefore exhibits his bill of interpleader against them, praying that the court may judge between them to whom the thing belongs, and that he may be indemnified. It claims no right in opposition to those claimed by the persons against whom the bill is exhibited, but only prays the decree of the court, to decide between the rights of those persons for the safety of the complainant."²

The allegations in a bill of interpleader are: 1. That two or more persons have preferred a claim against the complainant; 2. That they claim the same thing; 3. That the complainant has no beneficial interest in the thing claimed; and 4. That he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs.³

It is not necessary that an action or actions should have been commenced in order to give the right to file this bill,⁴ nor that the claims should be both of an equitable nature; one may be an equitable and the other a legal claim. But the bill cannot be filed where the plaintiff stands in the relation of a wrong-doer towards either of the claimants, nor where one of them has a clear right to the exclusion of the other.⁵ To sustain the bill, there must also be some sort of privity between all the parties, of estate, title or contract. Parties claiming in absolutely adverse rights, not founded in any privity of title, or on any common contract, cannot be compelled to interplead.⁶

¹ 2 Barb. Ch. Prac. 118; *Atkinson v. Manks*, 1 Cowen, 691; *Ball v. Liney*, 48 N. Y. 6, 13; *Johnston v. Lewis*, 4 Abb. Pr. N. S. 150; *McKay v. Draper*, 27 N. Y. 256; *Schuyler v. Hargous*, 28 How. Pr. 245; *Crane v. McDonald*, 118 N. Y. 648.

² *Cooper's Equity Plead.* 456; *Harrison Ch. Pr.* 96; *Mad. Ch.* 172, 3.

³ *Atkinson v. Manks*, 1 Cowen, 703; *McHenry v. Hazard*, 45 Barb. 657; *U. S. Trust Co. v. Wiley*, 41 Barb. 477; *Bassett v. Leslie*, 123 N. Y. 396, 399; *Killian v. Ebbinghaus*, 110 U. S. 568; *Crane v. McDonald*, 118 N. Y. 648.

⁴ *Richards v. Salter*, 6 John. Ch. R. 445.

⁵ *Mohawk and Hudson Railroad Co. v. Clute*, 4 Paige, 384; *Shaw v. Coster*, 8 Paige, 339; *Morgan v. Fillmore*, 18 Abb. Pr. 217; *U. States v. Victor*, 16 Abb. Pr. 153; *Bassett v. Leslie*, 123 N. Y. 396.

⁶ *Cooper Eq. Pl.* 43; *Story's Eq. Pl.* 239; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Boston Bank v. Skillings, etc., Lumber Co.*, 132 Mass. 410. Whether this rule still exists in this State is perhaps an open question. See *Crane v. McDonald*, 118 N. Y. 648, 656, 657. The fact that the adverse titles of the claimants are both derived from a common source is sufficient to sustain an interpleader under the rule requiring privity between defendants. *Id.*

§ 56. Chattels deposited by several joint owners must be redelivered on the joint demand of the persons making the deposit. Sir William Jones mentions an instance in which this principle was applied in practice at Athens, with the remark that the doctrine was good at Rome as well as at Athens, when the thing deposited was in its nature incapable of partition.¹ The civil and common law do not differ in this respect; the thing deposited must be restored to the joint owners or proprietors making the deposit. But if the bailee accepts the property from one of them, by whom as well as by the bailee it is treated as belonging to him exclusively, he will be protected by a redelivery of the property to him who bailed it.²

§ 57. The civil and common law approximate each other so nearly in respect to the obligation of the depositary relative to his duty to redeliver the subject of bailment, that it may be proper to mention briefly the provisions of the Code of Louisiana, which is in substance the civil law. The depositary by this Code must restore the thing deposited only to him who delivered it, or in whose name the deposit was made, or who was pointed out to receive it. He cannot require him who made the deposit to prove that he was the owner of the thing. Yet if he discovers that the thing was stolen, and who the owner of it is, he must give him notice of the deposit, requiring him to claim within due time. If the owner, having received due notice, neglects to claim the deposit, the depositary is fully exonerated on returning it to the person from whom he received it. If the person who made the deposit be deceased, the thing deposited can be restored only to his heir; if there be several heirs, it must be delivered to each of them for his respective part and portion, unless the thing deposited be indivisible, in which case they must agree among themselves. Where the depositor has changed condition, as if a woman marries, or a person of full age falls under interdiction, the deposit can be restored only to the person who has the administration of the rights and property of the depositor. Where the deposit has been made by a tutor, a husband, or by any other administrator, it can be restored, after the function of that administrator had ceased, only to him whom he represented. When the contract specifies a place where the deposit is to be restored, it must be delivered at that place, but the expense of conveyance to the place of delivery must be borne by the depositor. If the contract does not specify the place where the deposit must be restored, it is to be restored at the place where such deposit has been made; and it must be restored as soon as it is de-

¹ Jones on Bailm. 51; *Brandon v. Scott*, 40 Eng. L. & Eq. 105; *Mitchell v. Williams*, 4 Hill N. Y. 13; *Jessop v. Miller*, 1 Keyes, 321.

² *May v. Harvey*, 13 East. 197.

manded, even though the time for its restoration stipulated for has not arrived. The depositary is not allowed to retain the goods deposited on any pretence of a debt due him from the depositor, by way of offset, but he may retain it for any advances made arising from the deposit.¹

§ 58. Under the common law, if the bailee refuse to deliver goods on demand made by the depositor, or does any act by which he acknowledges to hold them for a third person, he is responsible for a conversion of the property, and after having done so, the agent placing his refusal upon the absence of his principal, the bailee cannot claim to hold on the ground of lien for storages and charges paid. So, if he receive them for a particular purpose and transfer them in contravention of that purpose, even though it be to a bona fide purchaser, without notice, the latter cannot resist the claim of the owner.² So closely is the depositary held to the execution of the terms of his contract, that it has been asserted that where goods are delivered to a bailee, to be delivered over to another, and afterwards an action is brought by a person having a right to the goods, the defendant may, pending the action, deliver over the property to the person to whom it was delivered, and thereby discharge himself.³ But the bailor, in cases of naked bailment, has the right to countermand his bailment; and after that, the delivery by the bailee will not be good. The right of countermand arises out of the gratuitous nature of the contract.⁴ Where the bailee has delivered the goods to a second bailee, he has the right to demand and recover them; and the original bailor has the same right of recovery from either bailee, because he has the property, and both are bound to answer him.⁵ And it was formerly held, that where the second bailee delivers the goods to the original bailor, it would be no bar to a suit by the first bailee against him. But this doctrine is now entirely exploded by later authorities.⁶

§ 59. After a legal demand has been made by the bailor, the bailee must answer for any loss or casualty that may happen to the goods; unless, perhaps, in cases where it may be strongly presumed that the

¹ Code of Louisiana, Art. 2920 to 2927. As to the obligations of a depositary under the California statutes, see Cal. Civil Code, §§ 1822-1827. A naked bailee cannot be held liable for a delivery to the wrong person where the agent of the person entitled to the property has given him to understand that it was for the one to whom it was delivered. *Brant v. McMahon*, 56 Mich. 498.

² *Holbrook v. Wight*, 24 Wend. 169; *Wilkinson v. King*, 2 Camp. N. P. C. 335; 2 Stark. N. P. C. 311; *Medlin v. Wilkerson*, 81 Ala. 147; *Gottlieb v. Hartman*, 3 Col. 53.

³ *Bac. Abr. Bailm. D.*

⁴ *Winkley v. Foye*, 33 N. H. 171.

⁵ *Isaac v. Clark*, 2 Bulst. 306, 312.

⁶ *Agle v. Atkinson*, 5 Taunt. 759; *Whittier v. Smith*, 11 Mass. R. 211.

same accident would have befallen the thing bailed, even if it had been restored at the proper time. At common law, the general rule is that a refusal to deliver on demand, or at the time or place stipulated, will be received as evidence of a conversion of the property, which will render the bailee liable for its value.¹ Whatever acts amount to a conversion of the property, or a denial of the bailor's rights over it, will render the bailee from that time absolutely responsible for it, and cast upon him all the risks that may afterwards attend the property.² Of course a sale or misuse of the goods bailed will render the bailee liable for them; by selling them he makes himself guilty of a breach of faith, which renders him liable for their full value; by any misuse of the goods, equivalent to a denial of the owner or depositor's rights in them, the bailee makes himself responsible for the property.

§ 60. A conversion of the goods by the depositary instantly confers upon the owner or depositor a right of action to recover the value of the property; and this right of action is not impaired by the subsequent loss or injury of the goods. The law will not allow the bailee to escape from his liability for the wrongful conversion of the property, on the ground of misfortune in his subsequent dealings with it. As a wrong-doer he must bear the consequences of his tortious act from its date,³ and in some cases forward even to the day of trial.⁴ Certainly the rule of damages gives to the owner not less than the value of the goods, with interest from the time of the conversion.⁵

When the depositor does not know of the conversion until some time afterward, and the value of the goods converted is uncertain or fluctuating, it is not unreasonable to give him the value of his goods when he calls for them; nor can it be said that this rule operates inequitably towards the wrong-doer; because he received and held the goods under a contract binding him to redeliver them on demand, and cannot reasonably claim a discharge from his contract on the ground of his own previous tort. A man wrongfully takes and converts your timber into boards or shingles; and being sued in trover for the manufactured article, he cannot show the conversion of the timber in answer to your demand for the boards or shingles; he is not allowed to antedate or carry back his wrongful act to relieve himself of its burden.⁶

¹ *Brown v. Cook*, 9 John. R. 361; *May v. Harvey*, 13 East. 197.

² *Sargent v. Gile*, 8 New Hamp. Rep. 325.

³ *Collins v. Bennett*, 46 N. Y. 490; *Woodman v. Hubbard*, 25 N. H. 67.

⁴ *Romaine v. Van Allen*, 26 N. Y. 309; *Burt v. Dutcher*, 34 N. Y. 493; *Markham v. Jaudon*, 41 N. Y. 237. See on rule of damages, *Baker v. Drake*, 53 N. Y. 211.

⁵ *Brizsee v. Maybee*, 21 Wend. 144; *Andrews v. Durant*, 18 N. Y. 496.

⁶ *Brown v. Sax*, 7 Cowen, 95; *Baker v. Wheeler*, 8 Wend. 505; *Curtis v. Groot*, 6

§ 61. A restoration of the goods, after an act of conversion, does not take from the owner his right of action; he may still maintain the action of trover, and recover in it his actual damages.¹ The wrong-doer cannot annul the consequences of his wrongful act by an offer to restore the chattel, or by an actual return of the property.² The owner may still recover the damages he has sustained in consequence of being deprived of the use of his property; or even special damages, the direct and natural consequence of the wrongful act.³ Time lost and labor spent in searching for the property taken or appropriated, may be recovered in the form of damages.⁴ A decrease in the value of the goods from the delay, may be also recovered.⁵

§ 62. It is the depositary's duty to restore the goods on demand, and where he fails to do so he is bound to render some account of them; the omission to redeliver naturally calls upon him for some explanation. The form of the action affects to some extent the burden of proof. In the action of trover, an unexplained refusal to restore the goods is evidence of a conversion—evidence from which the jury may find the fact of a conversion;⁶ it is therefore sufficient to cast the burden of proof upon the defendant; and thus compel him to show a loss of the goods without fault on his part.⁷ In an action founded upon the bailee's contract, the plaintiff must prove the contract and the breach or failure to redeliver; the burden of proof is then cast upon the bailee to show due diligence in the custody or keeping of the goods, or a loss of them notwithstanding such diligence; this is clearly the rule in actions brought against a depositary for hire, and the reason of the rule applies with equal force in actions against a bailee without hire.⁸ When the property

John. R. 168; *Babcock v. Gill*, 10 John. 287; *Rice v. Hollenback*, 19 Barb. 664; *Salisbury v. McCoon*, 3 N. Y. 379. See *Guckenheimer v. Angevine*, 81 N. Y. 394, 397; *Cavin v. Gleason*, 105 N. Y. 256, 261; *Newton v. Porter*, 69 N. Y. 133, 136, 137; *Firmin v. Firmin*, 9 Hun, 571.

¹ *Reynolds v. Shuler*, 5 Cowen, 323; *Livermore v. Northrup*, 44 N. Y. 107; *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 47; *Barrelett v. Bellyard*, 71 Ill. 280.

² *Hanmer v. Wilsey*, 17 Wend. 90, 93; *Otis v. Jones*, 21 Wend. 394. See ante, § 42; *Stephens v. Koonce*, 103 N. C. 266.

³ *Woodruff v. Cook*, 25 Barb. 505; *Bennett v. Lockwood*, 20 Wend. 223.

⁴ *McDonald v. North*, 47 Barb. 530; and see *Clinton v. Townsend*, 46 How. Pr. 42.

⁵ *Rowley v. Gibbs*, 14 John. 385; *Suydam v. Jenkins*, 3 Sand. 614.

⁶ 2 *Greenleaf's Ev.* §§ 644, 645; *Bradley v. Spofford*, 3 Foster, N. H. 444.

⁷ *Wellington v. Wentworth*, 8 Met. 548; *Collins v. Bennett*, 46 N. Y. 490; *Caldwell v. Nat. Mohawk Valley Bank*, 64 Barb. 333; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263; *Taussig v. Schields*, 26 Mo. App. 318; *Gleason v. Beers*, 59 Vt. 581. See *Stewart v. Stone*, 127 N. Y. 500, 506.

⁸ *Arent v. Squire*, 1 Daly, 347; *Schwerin v. McKie*, 5 Robertson, N. Y. S. C. 404, 419, and cases there cited; *Goodfellow v. Meegan*, 32 Missouri, 280; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263, 267; *Hayes v. Kedzie*, 11 Hun, 577.

is returned in a damaged condition, that is, injured in such a way or to such an extent as does not ordinarily occur without culpable negligence, it rests with the bailee to show how the injury occurred, and that he was not guilty of the negligence that caused it.¹ The rule here rests upon two grounds: first, the facts relating to the injury are peculiarly within the knowledge of the bailee, and second the injury is of such a nature that it does not usually occur without negligence on the part of the custodian.² It follows that the burden of proof is not cast upon the bailee where the injury is of such a nature that it might well occur in the ordinary course of things, or where the loss appears to have arisen under circumstances consistent with due diligence.³

When the trial commences, the burden of proving negligence rests with the party alleging it as the ground of his action or defense; the amount of proof required to establish the fact, *prima facie*, depends very much upon the circumstances attending the transaction.⁴

§ 63. As against the true owner, the bailee holding property on deposit gratuitously does not stand in any better condition than the bailor; since the true owner may follow and take the property in whose hands soever it may be found.⁵ Against every other person, the general principle is, that actual and lawful possession gives a right of action to the person holding personal property, for its protection.⁶ It was formerly considered that the plaintiff in such cases must show a special property in the goods claimed, in order to maintain the action;⁷ but that doctrine has been recently so far modified as to give the bailee, or person in possession, a right of action against all persons who wrongfully interfere with the goods.

§ 64. Wherever the goods or chattels pass into the hands of the bailee under a written contract, by the terms of which they are deliverable on demand at a particular place, the bailor cannot recover them until they have been properly demanded according to the contract; neither can he

¹ Collins v. Bennett, 46 N. Y. 490, 494. In this case the horse in question was foundered and rendered worthless while in the bailee's possession. *McDaniels v. Robertson*, 26 Vt. 340; *Arnot v. Brancionier*, 14 Mo. App. 431.

² *Cairnes v. Robbins*, 8 Mees. & Wels. 258; *Rose v. Hill*, 2 Man. Gr. & Scott, 787.

³ *Platt v. Hibbard*, 7 Cow. 497; *Watson v. Bauer*, 4 Abb. Pr. N. S. 273.

⁴ *Lamb v. Camden & Amboy R. & T. Co.*, 46 N. Y. 271, 279; *Russell Manuf. Co. v. New H. S. Co.*, 50 N. Y. 121, 126.

⁵ *Cook v. Holt*, 48 N. Y. 275; *Calhoun v. Thompson*, 56 Ala. 166.

⁶ *Armory v. Delamirie*, 1 Str. 504; *Fisher v. Cobb*, 6 Vermont R. 622; *Sutton v. Buck*, 2 Taunt. R. 302; *Miller v. Adsit*, 16 Wend. 335; 5 Taunt. 579; *White v. Webb*, 15 Conn. R. 302.

⁷ *Templane v. Case*, 10 Mod. R. 25; 5 Mass. R. 304; *Hoyt v. Gelston*, 13 John. R. 151, and 14 do. 131.

require their delivery at any other place than that specified. If no place is specified for their delivery, they are deliverable at the place of deposit, and the bailee cannot be required to produce them at any other place, unless he has voluntarily stipulated to do so.¹ As in other cases, the contract regulates the place and mode of the delivery, and the time or event on the occurrence of which it is to be made.

§ 65. *Right to Use.* How far the bailee's right to use the goods or chattels deposited with him goes, depends upon the circumstances of the case. If the property is bailed with the evident intention that it shall be used, its use will not impose upon the bailee any additional obligation.² It is laid down as a general rule that the depositary has no right to use the thing deposited, except in those cases where its use may be necessary for the preservation of the deposit, or where the consent of the depositor may be reasonably presumed. If he use the thing deposited, in cases where no such consent can be inferred, the bailee is answerable for all casualties.³ There are many instances in which this consent to the use of the subject of bailment will be presumed. The civil and common law agree that the depositary cannot make use of the thing deposited, without the express or implied permission of the depositor.⁴ The bailee, it should seem, may use moderately a horse left in his custody, may milk a cow left in his possession, or use the books of a friend deposited in his library; such use is not injurious to the property, and is sometimes very useful for its preservation.⁵ If the bailee derive profit or advantage from such use of the property deposited with him, he is, at least under the civil law, answerable for the value of such use; the effect of such use must, therefore, under that law operate to change the nature of the contract into a bailment for hire, thus enhancing the degree of care and diligence required of the bailee.

§ 66. The naked depositary ought neither to be injured nor benefited in any respect by the trust undertaken by him; in an emergency, he has an implied authority to incur expenses on behalf of the owner for the preservation of the property; and where he is himself at some

¹ *Brown v. Cook*, 9 John. R. 361; *Phelps v. Bostwick*, 22 Barb. 314.

² *De Foncleur v. Shottenkirk*, 3 John. R. 170.

³ 1 Cowen's *Trea.* 71, 3d ed.; *Beach v. R. & Del. Bay Co.* 37 N. Y. 457; *Collins v. Bennett*, 46 N. Y. 490; *Lane v. Cameron*, 38 Wis. 603. The California Code provides that a depositary may not use the thing deposited, or permit it to be used for any purpose, without the consent of the depositor; and that a depositary is liable for any damage happening to the thing deposited during his wrongful use thereof, unless such damage must inevitably have happened though the property had not been thus used. Cal. Civil Code, §§ 1835-1836.

⁴ Code of Louisiana, Art. 2911; *Bac. Abr. Bailm. D.*; 2 Kent's *Comm.* 568.

⁵ Story on *Bailm.* § 89; Jones on *Bailm.* 81.

expense in keeping the property deposited with him, he may without doubt make use of it in a reasonable manner by way of compensation for the charge.¹ Is his liability increased by reason of his making use of the deposit, the use being less in value than the expenses incident to its custody? The bailment here is not wholly gratuitous, and yet on the whole the bailee acquires no advantage from it; he is but partially paid for his services. It seems, however, that he is bound to the use of ordinary care;² the related rules of law give strength to this impression.³

Where the thing deposited is of such a nature that it imposes no charge upon the depositary in the keeping of it, as in the case of a deposit of jewels, no doubt can arise; if the bailee wear them, he will be liable for their loss; liable because he exposed them to the danger of loss, and by so doing was guilty of an act of conversion.

§ 67. A deposit of articles shut up in a box, or under a sealed cover, should not be examined by the depositary, since he should not seek to know what the depositor has concealed from him.⁴ If the things deposited be locked up in a box or chest, or enclosed in a wrapper under seal, this circumstance would imply that they are not to be used; books, jewelry, plate or pictures deposited in this manner should be retained carefully in the condition in which they are received.⁵ So also if the goods are of such a character as to be impaired by usage, they must not be used; since it cannot be presumed that the owner intended to place them at the disposal of the depositary for his own advantage. The presumption would be different with respect to such things as would be very little if at all injured by use, as books left with a friend neither boxed nor locked up, in the use of which even moderate care would prevent them from being injured.⁶ Still the general doctrine seems to be that the depositary, who uses the thing bailed with him, is responsible if it be lost or injured while it is so used; the use so far affects the contract as to make it partake of the nature of a loan, and thus casts upon the depositary the increased responsibility of the borrower, who must answer for any accident which a very careful and vigilant man could have avoided. If the use be without either the express or implied consent of the depositor, the law is that the depositary is liable in any

¹ Harter v. Blanchard, 8 Albany Law Journal, 12, 13; 64 Barb. 617, opinion by SMITH, J.

² Newhall v. Paige, 10 Gray (Mass.) 366.

³ Smedes v. Utica Bank, 20 John. R. 372; 3 Cowen, 663; Bank of Utica v. McKinstery, 11 Wend. 473; Robinson v. Smith, 3 Paige, 222; 1 Edw. Ch. 513, 543.

⁴ Code of Louisiana, Art. 2914; Cal. Civil Code, § 1835.

⁵ Story on Bailments, § 90.

⁶ Jones on Bailment, 81; 2 Ld. Raym. 917.

event of loss or damage; he becomes thereby guilty of such a violation of his contract or trust that he must answer for any and every mischance. Such authorized use of the goods for his own convenience, by which they are exposed to the dangers of injury or loss, justly imposes on the bailee the duty of answering for them in any event.¹

§ 68. The person making a deposit must reimburse the depositary the money he has advanced for the safe keeping of the thing, and indemnify him for all the deposit has cost him. He must also indemnify the depositary for the losses which the thing deposited may have occasioned him;² this is the rule of the civil law, and it would seem to be equally good at common law. Under the civil law such advances or losses became a lien upon the chattels in deposit, but at common law no lien attaches for such a demand;³ it is, it would appear, only a right of action, though it would doubtless be more equitable to allow a lien in such cases. If the bailee come into the possession of the property by finding, and the owner offers a reward for the restoration of it to him, the reward becomes a lien on the property.⁴

§ 69. The bailee has no right to pledge goods deposited with him for an advance of money; that is a use of the property not authorized by law, in direct violation of his contract. The owner in such a case may follow and recover the property in whose hands soever it may be found. The action of trover lies against the person in possession, who refuses to deliver up the goods,⁵ and thereby converts them to his own use. The transfer to him being wrongful, he acquires no greater right over the property than was possessed by the original bailee. Whatever special property the bailee acquires in the goods, his right and control over them are limited by the terms of the contract under which he has them in custody. He has, it would seem, only a possessory interest in them,⁶ and, strictly speaking, no right of property. The law gives him an interest sufficient to carry out and accomplish the purposes of the contract,⁷ which extends to the defense of the property by action against any and all persons who may interfere with it, but does not include the right to bestow it or make use of it in any way not evidently contemplated by the parties to the contract of bailment.

§ 70. Goods in the possession of one who has only the custody of

¹ 3 Atk. R. 44.

² Code of Louisiana, Art. 2931; Jones on Bailm. 47.

³ Story on Bailm. § 121; Nicholson v. Chapman, 2 H. Black. R. 254; Amory v. Flynn, 10 John. 103; Harter v. Blanchard, 64 Barb. 617.

⁴ Wentworth v. Day, 3 Metc. R. 325.

⁵ Hartop v. Hoare. 3 Atk. R. 44; Waterman v. Robinson, 5 Mass. R. 303.

⁶ Commonwealth v. Morse, 14 Mass. R. 217.

⁷ Giles v. Grover, 6 Bligh R. 277; Story on Bailment, § 93.

them for the time being, as where they are in the keeping of the owner's servant, and he delivers them for safe keeping into the hands of a depositary, must be redelivered to the owner on demand. Until a demand is made or notice given, the depositary will be protected in the act of restoring the goods to the person from whom he received them; this at least is the principle of the civil law, under which the bailee, if he discover that the goods were stolen, or who the true owner of them is, must give notice to him of the deposit, requiring him to make his claim in due time.¹ If this is not done, he is at liberty to restore the goods to the bailor. At common law the owner of stolen property may follow it and retake it in whose hands soever it may be found.² Though possession of personal property is *prima facie* evidence of title, it may be overcome by positive testimony; and since on every sale of personal chattels there is an implied warranty of the title to them, the remedy of the innocent purchaser of stolen property is by an action against the vendor. The title of the owner cannot be divested by the action of third persons without his concurrence or such neglect on his part as induces the purchaser to part with value for the same. An exception to this general rule exists in England, in respect to sales made in market overt; but the exception is not recognized in this State.³

Even an auctioneer who sells stolen goods is liable to the owner in an action of trover, notwithstanding the goods are sold and the proceeds paid over to the thief without notice of the felony.⁴ The exception in England, just mentioned, founded on a custom which prevailed principally in the city of London, has always been regarded and restricted by the courts, with unusual jealousy and vigilance.⁵ In the origin of the custom, sales in fairs or markets overt were regulated with great strictness, so as to give to them the utmost publicity and surround them with every circumstance of openness and fair dealing.⁶ As we have in this State no such market, sales here have no other effect than mere private sales in England.⁷

§ 71. The rule is different where property has been acquired by a

¹ Code of Louisiana, Art. 2921; Cal. Civil Code § 1826.

² Cowen's Trea. 3d ed. 329; Rogers v. Weir, 34 N. Y. 463, 468; Newton v. Porter, 5 Lans. 416; Bassett v. Spofford, 45 N. Y. 387; Breckenridge v. McAfee, 54 Ind. 141; Courtis v. Cane, 32 Vt. 232.

³ Hoffman v. Carow, 20 Wend. R. 21; S. C. 22 Wend. 285; Barnard v. Campbell, 55 N. Y. 456, 462; Mowrey v. Walsh, 8 Cow. 238; Levi v. Booth, 58 Md. 305; Dame v. Baldwin, 8 Mass. 518.

⁴ Hoffman v. Carow, 20 Wend. R. 21.

⁵ Wheelright v. Depeyster, 1 John. R. 480.

⁶ 2 Black. Comm. 449, 450.

⁷ Mowrey v. Walsh, 8 Cowen R. 238.

fraudulent purchase, which, though void as between the parties, confers upon the vendee the possession of the property, and thereby enables him to dispose of it to a *bona fide* purchaser for value. In this case the purchaser in good faith holds by a title superior to that of the original owner; since the latter by parting with the possession has armed the fraudulent vendee with the evidence of title, and thus enabled him to appear as the owner in a sale of the property.¹ He has made a delivery with an intent to pass the title, and after that he is not permitted to follow and retake the goods from the hands of an innocent purchaser, or pledgee who has made advances upon them in good faith.²

§ 72. It is seldom that a depositary can defend himself from liability by showing a delivery to a wrong party; because, as a general fact, he knows or has the means of ascertaining the true owner. *Prima facie* therefore he is liable for a misdelivery, like a bailee for hire.³ The return of the goods to the owner is so essential in the discharge of his obligation, that the law will not lightly excuse the bailee from its performance; but where the goods came into his possession through the owner's neglect, and he does not know to whom they belong or by whom they were left, it seems he discharges his duty by the exercise of all reasonable care and vigilance in the delivery of them to a claimant describing so as to identify the goods.⁴ As a gratuitous bailee he is not liable for the goods where they are lost without gross negligence on his part; but while it may be possible for him to excuse a loss by a misdelivery, where he is not chargeable with want of due care, it is quite clear that in the affirmative duty of redelivering the goods, he must act with prudence and discretion.⁵

§ 73. The law always aids the true owner to recover his property; and it is a general rule that the bailee cannot dispute the title of his

¹ Andrew v. Dieterick, 14 Wend. R. 31; Paddon v. Taylor, 44 N. Y. 371; Simpson v. Del Hoyo, 94 N. Y. 189; Winne v. McDonald, 39 N. Y. 233.

² Andrew v. Dieterick, 14 Wend. R. 31; Mowery v. Walsh, 8 Cowen R. 238; Root v. French, 13 Wend. R. 570.

³ Coffin v. Henshaw, 10 Ind. 277; James v. Greenwood, 20 La. Ann. R. 297; Nelson v. King, 25 Texas, 655; Esmay v. Fanning, 9 Barb. 176; Brandon v. Scott, 40 Eng. Law & Eq. 105; Colyar v. Taylor, 1 Coldwell (Tenn.) 372.

⁴ Morris v. Third Ave. R. Co., 1 Daly, 202. In this case the railroad company, taking up a satchel left in a car, was treated as a bailee for hire; and a verdict was rendered against the company for the property on the ground of a want of due care, notwithstanding the satchel had been honestly delivered to a claimant. Tabor v. Gardner, 6 Abb. Pr. N. S. 147.

⁵ Skelly v. Kahn, 17 Ill. 170. In this, a case of mandate, the bailee was not allowed to excuse the loss of a sum of money by showing that he handed it to a boy for delivery. A carrier cannot excuse a misdelivery, by showing an honest delivery on a forged order. Powell v. Myers, 26 Wend. 591.

bailor. When therefore the bailee is applied to for the property by a third party claiming title, his prudent course is to leave the claimant to his action, and at once notify his bailor of the suit; he is not obliged to bear the burden of a litigation; and it is not safe for him to surrender the property on demand.¹ For nothing will excuse a bailee from the duty to restore the property to his bailor, except he show that it was taken from him by due process of law, or by a person having the paramount title, or that the title of his bailor has terminated.² By surrendering the property on demand to a third party, the bailee assumes the burden of establishing the title he thus acknowledges.

¹ Welles v. Thornton, 45 Barb. 390; Roberts v. Stuyvesant S. D. Co., 123 N. Y. 57.

² Bates v. Stanton, 1 Duer, 79; Van Winkle v. U. S. Mail S. Co., 37 Barb. 122; Bliven v. Hudson R. R. Co., 36 N. Y. 403; 35 Barb. 191; Burton v. Wilkinson, 18 Verm. R. 186; Aubery v. Fiske, 36 N. Y. 47; McKay v. Draper, 27 N. Y. 256; Sinclair v. Murphy, 14 Mich. 392; Osgood v. Nichols, 5 Gray, 420; Stiles v. Davis, 1 Black, 101; Pulliam v. Burlingame, 81 Mo. 111; Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57. The bailee may always show an assignment of the title of the bailor to a third person. Roberts v. Noyes, 76 Me. 590. He may also show in justification of non-delivery to the bailor that the true owner compelled a delivery to himself of the goods bailed by legal process and that the bailor was immediately notified of the taking. Bliven v. Hudson River R. R. Co., 36 N. Y. 403; The Idaho, 93 U. S. 575. Where property in the custody of a bailee for hire is demanded by third persons under color of process, it becomes the duty of the bailee to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse and to offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of right to the property by another without legal process. Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57. The mere levy of an execution or attachment upon property by a creditor of the owner while in the possession of a tortfeasor is no defense in an action against the bailee. *Id.* And see Barnard v. Kobbe, 54 N. Y. 516.

CHAPTER III.

GRATUITOUS COMMISSIONS OR MANDATES.

§ 74. *Nature of the Contract.* The difference between a contract of bailment by deposit without reward, and that species of contract known as a mandate, is not very broad, and does not so much concern the nature of the contract as the mode of its performance. A mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them. The leading case of *Coggs v. Bernard*¹ decides, that where a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier and was to have nothing for the carriage. An executory contract of this kind cannot be enforced, since it wants a consideration to support it; it is an agreement to perform an act in the future, without any compensation promised or received, and it cannot be enforced in an action. But when the contractor actually enters upon the performance of the work contracted to be done, he is bound to perform it in a careful and workmanlike manner, and is responsible for neglect. A negligent performance of the undertaking by which the property is injured creates a liability for the loss occasioned.² The owner's trusting the bailee with the goods is held a sufficient consideration to oblige him to a careful management.

§ 75. *Subject of the Contract.* The subject matter of the contract of mandate, as in the contract of bailment by deposit, must be personal property, the custody of which is, for the time being, given into the hands of the mandatary.³

In the civil law, the contract might arise in respect to real property, as well as in cases where no property at all was concerned. What we term an agency, or a contract to perform certain specific work, was

¹ 2 Ld. Raymd. 909-913; Jones on Bailm. 53; 2 Kent's Comm. 569. In the case of a mandate, the labor and services are the principal objects of the parties, and the thing is merely accessorial.

² *Melbourne v. Louisville & N. R. Co.*, 88 Ala. 443.

³ Story on Bailm. §§ 144, 145.

termed mandate in the civil law; and the contract included a great variety of undertakings with respect to property, the custody of which was not transferred. A gratuitous agency constituted the contract, as to purchase a given piece of property, or to perform a particular piece of work. The obligations involved were similar to those imposed by our law under the same circumstances, but the classification is different.

§ 76. The Code of Louisiana makes the contract of mandate to arise in five different manners: for the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of such third persons and that of the party granting it; and finally for the interest of the mandatary and a third person. It is in form and effect a commission given by the mandator to another to transact for him, and in his name, one or several affairs. The object of the mandate must be lawful, and such as the mandator has the right to accomplish, and the contract is completed only by the acceptance of the mandatary.¹ Unless a compensation is agreed upon, the services are presumed to have been rendered gratuitously. In fact, the services are generally compensated under the Code of Louisiana, as is manifest from the great variety and matters of agency comprehended under this contract. In general, whatever may be committed to another by a procuration or power of attorney, is there embraced under the contract of mandate, sometimes in general terms to include all affairs, and again limited to one affair alone.

In respect to the performance of this contract, the mandatary is under that code responsible not only for unfaithfulness in his management, but also for his fault or neglect. But his responsibility with respect to faults is enforced less rigorously against the mandatary acting gratuitously, than against him who receives a reward.²

A broker is by the same law classed as a mandatary, who is employed to negotiate a matter between two parties, and is for that reason regarded as the mandatary of both,³ to whom he owes the same fidelity. His obligations and duties do not seem to differ very greatly from those imposed upon brokers and auctioneers under the common law.⁴

The compass of this contract under the civil law, it is evident from what has been said, embraces a much wider range of subjects and relations than are incident to the contract of mandate at common law. We have appropriated from that code only a single class of principles, appli-

¹ Code of Louisiana, Art. 2954, 2955, 6, 7.

² *Idem*, 2972.

³ *Idem*, 2985.

⁴ Code of Louisiana, Art. 2986, 7, 8.

cable to duties in respect to which our law was silent. We borrowed only such as we had need of, making them ours from time to time as an occasion arose, in the same manner as we have incorporated much of the civil law into our equity jurisprudence.

§ 77. *Feasance and Non-feasance.* The main distinction between a mandate and a deposit is that the former lies in feasance, and the latter simply in custody. The duties of the depositary are not so active as those of the mandatary; they do not require so much vigilance. A mandatary, like an unpaid agent, engages to use a degree of diligence and attention adequate to the performance of his undertaking; and though not bound by his original promise to enter upon the execution of the commission, he is bound, after having actually entered upon the business, to exert himself in proportion to the exigency of the matter in hand. This rule has been enforced where an agent without reward undertook to obtain an insurance on a vessel, and did the business so carelessly that the benefits derivable from the policy were lost.¹

In our law the contract of mandate is connected with a bailment or delivery of property: it was not so limited in the civil law.² And there is a class of cases in which, without any delivery of goods or property, an unpaid agent is held responsible for the use of diligence in the business he undertakes; as where a man receives a demand to collect gratis, or where a surgeon undertakes an operation without hire. The effort to collect must be made with ordinary diligence;³ and the operation must be performed with ordinary skill.⁴ The existence of a valid contract between the parties, founded on a consideration, is not essential to support an action for the misfeasance.⁵

¹ *Mallough v. Barber*, 4 Campb. 150; *Park v. Hammond*, 4 Campb. 344. A right to commissions for the service may affect the question. *Nellis v. De Forest*, 16 Barb. 61. See the opinion by WOODWORTH, J., 20 John. R. 378; and *Coggs v. Bernard*, 2 Lord Raym. 910.

² *Hadley's Introduction to Civil Law*, 207, 232.

³ *Moore v. Gholson*, 34 Miss. 5 George, 372.

⁴ *Carpenter v. Blake*, 60 Barb. 488; *S. C.* 50 N. Y. 696; 10 Hun, 358; 75 N. Y. 12; *McNevin v. Lowe*, 40 Ill. 209; *Craig v. Chambers*, 17 Ohio St. 253; *Haire v. Reese*, 7 Phil. Pa. 138; *Howard v. Grover*, 28 Maine, 97.

⁵ *Pippin v. Shepard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing, N. C. 733; 6 Exch. 767. The employment or retainer need not have been by the plaintiff. *Peck v. Martin*, 17 Ind. 115. The same degree of care and skill is required of a surgeon whether he serves gratuitously or for compensation. *Becker v. Janinski*, 27 Abb. N. C. 45; *Harris v. Woman's Hospital*, 27 Abb. N. C. 37. One who offers himself for employment in a professional capacity undertakes that he possesses that reasonable degree of learning and science which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community and those conversant with the employment as necessary to qualify him to engage in such business;

The distinction taken at an early day between *non-feasance* and *misfeasance* by a mandatary, is founded in the principle that though a person cannot be compelled to enter gratuitously upon the business of another, yet when he once takes it upon himself by beginning the work, he becomes responsible for any damages that may arise through his negligence or want of care. A non-feasance is a failure to perform; and a misfeasance is the performance in an improper manner of some act which it was his duty, by contract or otherwise, to have done, or of some act which he had a right to do.

The common law does not enforce a mere naked promise. Hence a mandatary, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only liable when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance, but is not answerable for a non-feasance, even where special damages are averred. This rule was applied where one of two joint owners of a ship voluntarily undertook to get the vessel insured, but neglected to do so, and the ship was lost. He was not held liable, because he had not come under a legal obligation.¹ Receiving property into his hands, under a promise to do some act in relation

that he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the purpose for which he is employed; and to use his best judgment in the exertion of his skill and the application of his diligence. *Carpenter v. Blake*, 10 Hun, 358; S. C. 75 N. Y. 12. A surgeon is not liable for a want of the highest degree of skill in the performance of an operation; but only for the want of ordinary skill, and for the want of ordinary care and judgment: held in respect to an alleged error in not removing more of a diseased thigh bone. *Howard v. Grover*, 28 Maine, 97. The law allows the practice of any system of medicine; *i. e.*, it does not prohibit the practice of any; but it does imply an undertaking on the part of every medical practitioner that he will use an ordinary degree of care and skill in his practice, according to his avowed system. *Bowman v. Woods*, 1 Greene, Iowa, 441; *Commonwealth v. Thompson*, 6 Mass. 134; *White v. Carroll*, 42 N. Y. 161; *Haire v. Reese*, 7 Phil. Pa. 138; *McNevin v. Lowe*, 40 Ill. 209. The burden of proof in a suit for malpractice is on the plaintiff. *Craig v. Chambers*, 17 Ohio St. 258. In England and in some of the States, the law requires that medical practitioners shall be licensed; and allows only a licensed physician to recover for medical services. *Biblin v. Simpson*, 59 Maine, 181; *Wragg v. Strickland*, 36 Ga. 559; *De La Rosa v. Prieto*, 16 Com. B. (N. S.) 578. The same rule formerly existed in this State. *Bailey v. Mogg*, 4 Denio, 60. It was for a time abrogated and subsequently revived. See Laws of 1880, Chap. 513; *Fox v. Dixon*, 34 State Rep'r 710. At present our law recognizes no particular school of medicine as the legal or authorized system. *White v. Carroll*, 42 N. Y. 161. A man who does not profess to be a physician nor to practice as such, and is merely asked his advice as a friend or neighbor, does not incur any professional responsibility. *Ritchey v. West*, 23 Ill. 325, cited in 40 Ill. 210.

¹ *Thorne v. Deas*, 4 John. R. 84. Leading case; opinion by Ch. J. KENT.

to it, creates a legal duty. Thus, a bank by receiving a note for collection, where it is to receive no direct compensation for the service, becomes bound to a faithful and diligent performance of the undertaking.¹ Under the common law the engagement is not considered a gratuitous undertaking, because of the average deposits accruing to the bank on account of such collections. Under the civil law it is treated as a bailment without reward, and the mandatary is held bound by the same obligation. The duty of the mandatary, though not placed on the same ground, is enforced with equal strictness under both systems.²

§ 78. *Rule of Diligence.* A mandatary is answerable for the same degree of diligence as a depositary; he must use such care as men of common sense and common prudence, however inattentive, ordinarily take of their own affairs, of a like kind; that slight or moderate degree of care which men naturally take of their own goods. He is not liable for a loss or injury, unless it happens through his gross negligence or bad faith. Like many other principles of law, this rule must be understood with reference to the article, the nature of the trust, and the circumstances attending its execution.³

§ 79. The supposed case of the diamond ring illustrates the principle which fixes the degree of care demanded of the mandatary; for instance, if Stephen desire Philip to carry a diamond ring from Bristol to a person in London, and he put it with bank notes of his own into a letter case, out of which it is stolen at an inn, or seized by a robber on the road, Philip shall not be answerable for it; although a *very* careful, or perhaps a commonly prudent man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but if he were to secrete his own notes with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chase, he would be bound, in case of a loss by stealth or robbery, to restore the value of it to Stephen.⁴ In general, the fact that the party did the work on the subject of the bailment with the same care that he did the work on like goods of his own, will repel the imputation of negligence.⁵ This presumption may, without doubt, be overcome by proof of actual negligence,

¹ Smedes v. Utica Bank, 20 John. 372; S. C. 3 Cowen, 662. See Edwards on Bills and Notes, 402, 460, 475; Ainsworth v. Backus, 5 Hun, 414, 416.

² Durnford v. Patterson, 7 Martin, 460, 464.

³ McNabb v. Lockhart, 18 Ga. 495; Jenkins v. Mathews, 1 Sneed, Tenn. 248; Carrington v. Ficklin, 32 Gratt, 670; Dunn v. Brunner, 13 La. Ann. R. 452; Tompkins v. Saltmarsh, 14 Serg. & Rawls. 275; Tracy v. Wood, 3 Mason, 132. One who collects rents for another gratuitously is liable only for gross negligence in the care of the money collected. Bronnenburg v. Charman, 80 Ind. 475.

⁴ Jones on Bailm. 63; Spooner v. Mattoon, 40 Vt. 300.

⁵ Lane v. Cotton, 1 Ld. Raym. 646; Kettle v. Bromsall, Willes' R. 121.

or of conduct which, though applied to his own goods, would be deemed negligent in a bailee without hire, of ordinary prudence.¹ Negligence is a fact to be found from the evidence.

§ 80. How far the mandatary may be rendered liable for the want of proper care, even where he shows the same neglect of his own goods, is very well shown in the action of *Tracy v. Wood*.² A undertook gratuitously to carry two parcels of doubloons for B, from New York to Boston, in a steamboat, by the way of Providence. A in the evening (the boat being to sail early in the morning,) put both bags of doubloons, one being within the other, into his valise with money of his own, and carried it on board of the steamboat and put it into a berth in an open cabin, although notice was given to him by the steward that they would be safer in the bar-room of the boat. A went away in the evening, and returned late, and slept in another cabin, leaving his valise where he had put it. The next morning, just as the boat was leaving the wharf, he discovered, on opening his valise, that one bag was gone, and he gave an immediate alarm and ran from the cabin, leaving the valise open there with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and, on his return, the other bag also was missing. An action being brought against him by the bailor for the loss of both bags, the question was left to the jury whether there was not gross negligence, although the bailee's own money was in the same valise. The jury were directed to consider whether the party used such diligence as a gratuitous bailee ought to use under such circumstances, and they found a verdict for the plaintiff for the first bag lost, and for the bailee for the second.

Here is another illustration of the same rule, that the bailee may be liable where he keeps the property as he does his own. The defendant, a coffee-house keeper, having the custody of money without reward, lost it, and gave this account of it: that he had put it, with a large sum of money of his own, into his cash box, which was kept in his tap-room;

¹ *Rooth v. Wilson*, 1 B. and Ald. 59. That the bailee has dealt with his property and the bailor's in the same way is a fact which always may be shown as an element in adjusting the standard of duty and deciding the question of its performance, as well as a test of the bailee's good faith. On the proof of such a fact a presumption of adequate diligence would ordinarily arise. But the question of the bailee's responsibility must be finally settled by a resort to the settled principle which deduces the measure of his duty in each particular bailment from a comparison of his conduct with the conduct of classes of men and not of individuals. The bailee is not shielded from liability for neglect of ordinary care by showing that he has been careless, inattentive and reckless in the management of his goods as well as those of the bailor. *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106.

² 3 *Mason R.* 132; *Conway Bank v. Amer. Ex. Co.*, 8 *Allen*, 512.

that the tap-room had a bar in it and was kept open on a Sunday, the rest of his house not being kept open on that day ; and that the cash box, with his own and the plaintiff's money, had been stolen on that day. The judge left it to the jury to say whether the defendant was guilty of gross neglect ; and told them that the loss of the defendant's own money did not necessarily prove reasonable care. The charge of the judge was afterwards held good, and it was decided, first, that the question of gross negligence was properly left to the jury ; and second, that there was evidence on which they might find for the plaintiff.¹

§ 81. The degree of care required of the mandatary is materially affected by the circumstances attending the execution of the contract, such as the kind and value of the goods bailed and their liability to injury. Lord Stowell puts this case in point: "If I send a servant with money to a banker and he carries it with proper care, he would not be answerable for the loss, though his pocket were picked by the way. But if, instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property so as to invite the snatch of any person he might meet in the crowded population of a large town, he would be liable ; because he would be guilty of *negligentia malitiosa*, in doing that from which the law must infer that he intended the event which has actually taken place."²

¹ Doorman v. Jenkins, 2 Adolph. and Ellis, 256. See Smith v. First National Bank of Westfield, 99 Mass. 605; Lancaster Bank v. Smith, 62 Pa. St. 47; Maury v. Coyle, 34 Md. 235, 247; Erie Bank v. Smith, 3 Brews. 9.

² Rendsberg, 6 Rob. Ad. 141, 155. So, also, the captain of a vessel who carries the goods of another, though not for hire, is bound to take prudent care of them; and where he intermeddles with the chest of a seaman, who has been casually left behind, he is bound to restore it to its former state of security, particularly if the contents be valuable. Thus in Nelson v. Macintosh, 1 Starkie N. P. 188, an action of case for so negligently carrying plaintiff's box, containing doubloons, dollars and other valuables, that the box and its contents were lost; plaintiff came on board the *Arundel*, of which the defendant was captain, at Trinidad, with the intent to work his passage home, but being casually on shore when the signal was given for sailing, was left behind. Plaintiff's box was stowed with others on the quarter deck, and soon after departure, was opened by the defendant, upon a suggestion that it might contain contraband goods. The box was fastened with a lock, and the lid was also nailed down; having ascertained the contents, the lid was replaced and nailed down again. Toward the termination of the voyage, the captain again opened the box in the presence of the passengers, and placed the contents in a canvas bag, which he deposited in his own chest in the cabin, where he usually kept his own valuables. On arrival at Gravesend, a river pilot was taken on board, and the captain and one mate left the vessel, another mate remaining on board; an excise officer was also on board, and two young men belonging to the vessel who slept in the cabin. On the next morning the captain's trunk containing the valuables was missing, and not afterwards found. The defendant introduced evi-

§ 82. A gratuitous bailee of money or small packages of great value must take the common care of them usually bestowed upon such articles; he must use a degree of diligence and attention adequate to the performance of the trust; such ordinary care as the circumstances naturally call for.¹

Being a gratuitous bailee, a volunteer in the service of another, he does not guarantee the safe transmission of the money, without an express stipulation to that effect. His engagement is to use the necessary care and diligence in the discharge of his trust; namely, such care in its transportation and delivery, as persons of common prudence in his situation usually bestow in the custody and keeping of similar property belonging to themselves.² He makes the business his own, and engages to employ upon it the same care, attention, and diligence which he would use were the business actually his own: the contract implied by law can hardly be more comprehensive.

§ 83. Where the owner of his own free will confides his property to the custody of another, he knows or may fairly be presumed to be acquainted with his character; and in such a case it is not unreasonable to assume that the owner assents that the bailee shall keep or carry the

dence tending to show that the property had been stolen by persons unconnected with the vessel. But Lord Ellenborough, before whom the action was tried, charged the jury that in a case like this, though a person does not carry for hire, he is bound to take proper and prudent care of that which is committed to him, and he left it to the jury to consider—1st. Whether the captain had not, under the circumstances, by the intermeddling and removal, imposed on himself the duty of carefully guarding against all perils to which the property was exposed in consequence of the alteration. 2d. Whether he had in fact carefully guarded the property; and that if they were of the opinion that the conduct of the defendant had imposed upon him the duty of carefully guarding the goods, and that he had been guilty of negligence, they were to find for the plaintiff; and the jury rendered a verdict for the plaintiff. It is evident from the above, as well as other cases, that the rule of liability is relaxed or rendered stringent so as to meet the circumstances of each particular case. The principle, indeed, remains the same in all cases, but its application is left mainly to the jury, who find from the circumstances whether there has been a loss through negligence. The mere mandatary, it is to be observed, is liable only for gross negligence; this is the general principle. *Stanton v. Bell*, 2 Hawks, 145; *Lodowski v. McFarland*, 3 Dana, 205; *Tracy v. Wood*, 3 Mason, 132. Gross negligence is the omission of that care which bailees without hire, or other mandataries, of common prudence, are accustomed to take of property of the like kind. Articles of great value, such as may be easily injured, demand a greater degree of care than those of less value. Money, jewelry, and pictures are of this description. *Graves v. Ticknor*, 6 N. H. 537.

¹ *Jenkins v. Mathew*, 1 Sneed, 248; *McNabb v. Lockhart*, 18 Georgia, 495; *Graves v. Ticknor*, 6 N. H. 537.

² *Eddy v. Livingston*, 35 Mo. 487; *Colyar v. Taylor*, 1 Cold. Tenn. 372; *The State v. Meagher*, 44 Mo. 363; *Jourdan v. Reed*, 1 Clarke (Iowa), 135.

same with the care which he usually takes of his own property.¹ For the same reason, the owner's assent that the business shall be transacted according to an established usage may be presumed.² But mere knowledge by the bailor of the mode in which the bailee receives and takes care of property intrusted to him, will not as a matter of law absolve him from liability for a want of due care: unless the circumstances be such as to establish an agreement as to the nature and degree of care to be used by the bailee.³

§ 84. A mandatary holds the property under a special trust, and is held to a strict fidelity in the execution of the trust; he must perform his engagement with perfect fairness and strict integrity. No reason can be suggested why he should not be held to the same rules of accountability as an ordinary trustee of personal property:⁴ and to the same rules which enforce the duties of an agent to his principal.⁵ Neither an agent nor a trustee is permitted to have or to acquire in the business committed to him, any interest adverse to that of the party for whom he acts.⁶ The relation in which he stands precludes him from any surreptitious dealing on his own account, at the expense of the principal or party on whose behalf he is acting.

Factors, agents, and brokers acting as such, and having the custody of money or property belonging to a principal, act in a fiduciary capacity; and are for that reason held to a strict liability.⁷ So an attorney collecting money for his client, or an agent receiving money to invest or to appropriate in a special manner, holds it in a like fiduciary capacity;⁸ and his duty to follow his instructions, or to account for the fund, is not much affected by the circumstance that he is or is not to be paid for his services. The remedy given against him by arrest is placed upon the ground of a violated trust.⁹

¹ *The William*, 6 Rob. Ad. R. 316.

² *Gibson v. Culver*, 17 Wend. 305; *Van Santvoord v. St. John*, 6 Hill, 157.

³ *Conway Bank v. Amer. Ex. Co.*, 8 Allen, 512; ante, § 50. See *Eastman v. Patterson*, 38 Vt. 146.

⁴ *Taylor v. Fire Department of N. Y.* 1 Edw. Ch. 294, 299; *Chapin v. Weed*, *Clarke's Ch. R.* 464.

⁵ *Reed v. Warner*, 5 Paige's Ch. R. 650, 656.

⁶ *Conkey v. Bond*, 36 N. Y. 427; *Morrison v. O. & L. C. R. R. Co.*, 52 Barb. 173.

⁷ *Duguid v. Edwards*, 50 Barb. 288.

⁸ *Gross v. Graves*, 2 Robt. 707; *White v. Platt*, 5 Denio, 269.

⁹ *Schieder v. Shiells*, 17 How. Pr. 420. See *Dodge v. Tileston*, 12 Pick. 328. The engagement of the mandatary partakes of the nature of a trust, in the execution of which a strict fidelity is required of him; as much as this is implied in a remark quoted from one of Cicero's speeches, that the ancient Romans considered a mandatary as infamous if he broke his engagement, not only by actual fraud, but even by more than ordinary negligence. *Jones on Bailm.* 63. The confidence reposed in him was

§ 85. A loan of animals to be used for their keep, creates a bailment for hire; and subjects the bailee to the rules applicable to that class of bailees.¹ So the delivery of a chattel on trial, pending a negotiation for a sale, to be kept at a price named or returned, creates a bailment mutually beneficial to the parties; the bailee is not liable for a loss or injury to property, where he has taken due or reasonable care of it.² So the delivery of goods to a party for use under a contract that they shall become his on his paying a certain sum, is to be treated as a bailment rather than a conditional sale;³ but there is certainly an element in the contract not found in a simple bailment; so that an action by the bailee against a trespasser for taking the property before the day fixed for payment, will not bar a second action by the vendor to recover its value.⁴

There is a clear distinction between the case of a delivery of a chattel on a condition that the party receiving it shall try it and keep it at a price named or return it within a given time in case he does not like it, and a present sale of a chattel giving the buyer the privilege of

evidently regarded as creating an obligation which could not be violated without dishonor, without incurring the infamy attaching to the betrayal of a trust. But this is rather a statement of the obligation, as it is felt by an honorable and faithful man, than a strictly accurate definition of the legal duty; for the law does not, as we have seen, hold the mandatary, without reward, to so strict a rule of responsibility as it imposes upon the bailee for hire. It prefers rather to base the obligation of the contract upon a consideration of benefit, or of actual trust, coupled with the custody of property; but in some instances, a moral obligation arising out of a pre-existing and valuable consideration is regarded as sufficient to support an express promise or undertaking, such as a debt barred by the statute of limitations. *Cook v. Bradley*, 7 Conn. R. 57. Where a legal obligation has once existed, it may be made the basis of a future undertaking valid in law. A mere moral obligation, which does not arise out of a pre-existing legal duty, will not support a promise.

¹ *Chamberlain v. Cobb*, 32 Iowa, 161; *Maxwell v. Henston*, 67 N. C. 305.

² *Hunt v. Wyman*, 100 Mass. 198; *De Foncleur v. Shottenkirk*, 3 John. R. 170; *Nichols v. Roland*, 11 Martin, 192; *Colton v. Wise*, 7 Ill. App. 395; *Foreman v. Drake*, 98 N. C. 311; *A. D. Puffer & Sons Manuf. Co. v. Baker*, 104 N. C. 148.

³ *Becker v. Smith*, 59 Pa. St. 469. In Pennsylvania a sale and delivery with an agreement that the title shall remain in the vendor until the price is paid, is regarded as fraudulent, and is held void as against the creditors of the vendee. *Heppe v. Speakman*, 7 Phila. R. 117; *Martin v. Mathias*, 14 S. & R. 214. It is not regarded as fraudulent where the property is and is to be employed in the service of the vendor until paid for. *Lehigh Co. v. Field*, 8 W. & S. 232; *Sterling & Son v. Goodrich*, 6 Pittsburgh Legal Journal, N. S. 174. A like decision was made in *Wait v. Green*, 36 N. Y. 556, and overruled or qualified in *Ballard v. Burgett*, 40 N. Y. 314. See *Austin v. Dye*, 46 N. Y. 500; *Comer v. Cunningham*, 77 N. Y. 391; *Brewer v. Ford*, 54 Hun, 116; *S. C. 59 Hun*, 17; *Frank v. Batten*, 49 Hun, 91; *Sargeant v. Metcalf*, 5 Gray, 506; *Hart v. Carpenter*, 24 Conn. 427; *Bigelow v. Huntley*, 8 Vt. 151.

⁴ *Hasbrouck v. Lounsbury*, 26 N. Y. 598.

returning it after a trial. There is a condition in each of these contracts: in the first, a condition on which the sale is to take place; and in the second, a condition on which the sale may be rescinded.¹ The right to rescind depends upon the terms of the contract; it is to be exercised in the time and manner agreed upon by the parties.²

§ 86. The action of *assumpsit* lies for the recovery of money appropriated or misapplied by the defendant.³ It lies on a valid promise made by the defendant to a third person, for the benefit of the plaintiff.⁴ Under the present practice an action for money had and received to the plaintiff's use may be maintained the same as under the old practice; without a demand, where it is received under an engagement to remit or pay it over without delay;⁵ and on a demand, where it is received as a deposit or under circumstances that justify the agent or bailee in waiting for instructions.⁶

Where a person accepts money from one man to deliver over to another, an action of *assumpsit* lies for not paying it over.⁷ And where an agent undertakes to effect an insurance, and fails to do so, it is his duty to give notice to his principal, for a breach of which duty the action of *assumpsit* will lie.⁸

A gratuitous undertaking, not accompanied by a bailment of any kind, as to obtain a policy of insurance, or to make an entry of goods for a friend at the custom-house, entered upon, binds him to act in good faith and with reasonable care; it does not render him responsible for the use of anything more than ordinary skill, or that degree of knowledge and skill usually possessed by men in his situation or business.⁹

§ 87. *The Contract.* An ingenious writer in the *American Jurist* maintains that there is, in fact, no *contract* formed between the mandator and

¹ *Hasbrouck v. Lounsbury*, *supra*, and *Hunt v. Wyman*, *supra*; *Bailey v. Colly*, 34 N. H. 29; *Vincent v. Cornell*, 13 Pick. 294.

² *Giles v. Bradley*, 2 John. Cas. 253; *Lord v. Kenny*, 13 John. R. 219; *Pinney v. Hall*, 1 Hill, 89. See also, *Burrell v. Root*, 40 N. Y. 496.

³ *Dumond v. Carpenter*, 3 John. R. 183; *Weston v. Barker*, 12 John. R. 276.

⁴ *Del. & Hudson C. Co. v. Westchester Co. Bank*, 4 Denio, 97; *Dingeldiein v. Third Ave. R. R. Co.*, 37 N. Y. 575; *Kelly v. Roberts*, 40 N. Y. 432, 438; *Lawrence v. Fox*, 20 N. Y. 268; *Secor v. Lord*, 3 Keyes, 525; *Coster v. Mayor*, 43 N. Y. 399.

⁵ *Stacy v. Graham*, 14 N. Y. 492; *Schwinger v. Hickok*, 53 N. Y. 280, 286; *Howard v. France*, 43 N. Y. 593; *Mills v. Mills*, 115 N. Y. 80; *Matter of Cole*, 34 Hun, 320; *Compton v. Elliot*, 16 Jones & Spencer, 211.

⁶ *Phelps v. Bostwick*, 22 Barb. 314.

⁷ *Wheatley v. Low*, Cro. Jac. 667.

⁸ *Callender v. Oelrichs*, 1 Arnold R. 401.

⁹ *Shiells v. Blackburne*, 1 H. Black. 158; *Mone v. Morgue*, Cowper, 480; *Percy v. Millandon*, 8 Martin N. S. 68, 75. See *Dartnall v. Howard*, 4 Barn. and Cress. 345; *Heinemann v. Heard*, 50 N. Y. 27, 35.

the mandatary ; and that though the mandatary is liable for misfeasance in the execution of his trust, he is so, not by virtue of his contract, but for his *tort*.¹ This theory is maintained in an elaborate article, the argument in which proceeds mainly upon the form of action, usually case, which is brought for the violation of the trust ; the question of liability being always tried and decided on the plea of *not guilty*.² “ The form of the action is not *assumpsit*, but case ; the plea is not *non-assumpsit*, but not guilty. In this view of the matter there is no inconsistency, no principle is violated, everything is congruous. The bailor’s want of right to sue for non-feasance is entirely consistent with his right to sue for misfeasance. *Assumpsit* cannot be for misfeasance as such. If you sue for misfeasance, your action is grounded on *tort*, not on contract. It arises *ex delicto*, not *ex contractu*. If there be a binding contract to do, and misfeasance in the execution of it, you may, generally speaking, bring *assumpsit* ; but then the gist of your action is the non-performance of the contract ; and you must take care to declare on the non-performance, and use the misfeasance as evidence of it ; for if there be misfeasance, the contract is not performed as it was agreed to be, and of course *assumpsit* lies for the breach.”

This distinction is very nicely drawn, but the difference between calling the undertaking of the mandatary a contract or a trust is not very broad. In either case, the obligation arises out of the relation of the respective parties to each other, and the *tort* or wrong consists in the failure to perform the act undertaken, with the degree of care which that obligation imposes upon him. Commentators and judges have uniformly spoken of this undertaking as a contract, treating and enforcing it as such, as often as it has been brought before a judicial tribunal, or discussed as an elementary question. It is none the less a contract because, in most cases, it is implied by law ; whether a recovery may be had for its violation depends upon the plaintiff’s showing that the defendant has failed to discharge the obligations it cast upon him, that is, has failed to do the act with proper care. Though the form of the action be case, it is usual and necessary to incorporate into the complaint the substance of the contract, and the plea of not guilty puts in issue simply the allegations of damage or loss by the negligence alleged.³ Other matters must be pleaded specially, as in actions of *assumpsit*. In the action of case, against a common carrier, the plea of not guilty operates only as a denial of the loss or damage through the default or

¹ Vol. 16, page 275.

² *Idem*, 262.

³ Appendix to Warren’s Law Studies, 2d ed. p. 37. See also, form of declaration, *Yates’ Pleadings*, 371 ; and *So. Ex. Co. v. McVeigh*, 20 Gratt. Va. 264.

negligence charged, but it does not put in issue the fact of the receipt of the goods by the defendant as a carrier for hire, nor the purpose for which they were received.

Assumpsit and case are in many instances concurrent remedies, under a practice so long established that it has interwoven itself with the first principles of the common law. Mr. Justice LITTLEDALE thus states the distinction between these two forms of action, from which we shall perceive how far the *tort* differs from a breach of contract:¹ "Where there is an express promise, and a legal obligation results from it, there the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the *gist* of the action. But where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case, founded in *tort*, is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action; and that form of action, in which the real cause of action is most accurately described, is the best adapted to every case."

§ 88. The consideration for the contract or undertaking of the bailee or the mandatary, in the action of case, is always stated to be the delivery of the goods at the instance of the defendant for the purpose contemplated by the parties; following which, comes the allegation that it became the duty of the defendant to take due care of the property so intrusted to him, and redeliver or carry the same according to the understanding under which it was received; then follows the allegation of a breach of duty, namely, an averment that the defendant, not regarding his duty in that behalf, did not take proper care of the thing bailed, whereby ensued damage or loss to the plaintiff. On a plea of not guilty, to such a declaration, though it put in issue only the question of negligence, it is evident that the cause of action arises in part out of the contract set forth by way of inducement. If we call it an implied contract, as it is in most cases, and the breach of the duty imposed by law a *tort*, the *tort* itself grows out of a failure to perform the duty or engagement implied by law from the relation into which the parties have entered towards each other. So that the emphasis which the writer in the American Jurist places on the fact, that the remedy here is by an action of *tort*, can hardly be held to negative the existence of a contract.²

¹ Burnett v. Lynch, 5 B. and C. 609.

² 16 American Jurist, 264 to 275.

Indeed, though there be an express contract on which an action of assumpsit would lie, still, if a common law duty results from the facts, the party may be sued in tort for any neglect or misfeasance in the execution of the contract; ¹ the action, however, is then grounded on the misfeasance, and the contract is stated as matter of inducement.

§ 89. It is plain that the form of pleading, while it may sometimes illustrate the principles of law on which the rights of parties may depend, does not determine this question. The cases all hold that there is a contract, and that the owner's trusting the mandatary with the goods is a sufficient consideration to oblige him to a careful management. ² An executory contract, to assume the duties of a mandatary to be performed at some future day, is not binding; but the breach of a trust undertaken voluntarily is a good ground for an action. ³ The actual entry upon the thing and taking the trust upon himself is held a consideration. Mr. Justice STORY puts this case by way of illustrating the principle involved: "If A should intrust a letter to B, containing money, to pay his note at a bank in Boston, due on a particular day, and B should gratuitously undertake to deliver the letter, and take up the note on that day, and he should neglect to carry the letter, or to take up the note, whereby the note should be protested, and A should suffer a special damage, B would, at the common law, be liable to an action for his negligence, and the delivery of the letter to B, under such circumstances, would be a part execution, and a sufficient consideration to support the action." ⁴ The same would be the case, no doubt, where the mandatary gratuitously engages to carry other property from one place to another; the engagement coupled with an actual receipt of the thing bailed creates the contract and binds him to its fulfillment. ⁵ The contract does not become perfect till some act is done by way of its execution.

§ 90. There are many cases in which goods come into a party's possession in the course of his business, or are left in his custody by accident or oversight, without any express contract for their safe-keeping, and where no compensation is expected or paid for their storage. *E. g.*, a common carrier, receiving and transporting a passenger and his baggage, ceases to be liable for the baggage as a carrier after the lapse of a reasonable time after its arrival at the place of destination; from that time he holds the baggage under a modified liability, analogous to that

¹ *Burnett v. Lynch*, 5 B. and C. 609; *Boorman v. Brown*, 3 Q. B. 511; *Tillinghast's Forms*, 418.

² *Coggs v. Bernard*, *Ld. Raym.* 909; 3 *Salk.* 11.

³ *Roll. Abr.* 10; 2 *Hen.* 7, 11; *Elsee v. Gatward*, 5 *T. R.* 143.

⁴ *Story on Bailm.*, § 171; *Shillabeer v. Glyn*, 2 *Mees. and Welsb.* 145.

⁵ *Coggs v. Bernard*, *Ld. Raym.* 909.

of a warehouseman. His duty to exercise care over the property thus remaining in his hands grows out of the original contract; he assumes the duty of keeping the property till called for; he does not hold it as a mere gratuitous bailee; he is therefore bound to exercise ordinary care in keeping and preserving the property.¹ His liability is modified to that of an ordinary bailee, not liable for a loss by fire;² the original contract, though modified in respect to the degree of liability assumed from a reasonable time after the arrival of the goods, being understood to contemplate a possible delay, and to cover the delivery.³

The same principle applies where goods are inadvertently left in a street car, and the carrier takes charge of them. Though there be no intent to deliver the property into the custody of the carrier, his custom of taking charge of it, when so left by the oversight of a passenger, enhances the security of this mode of travel; and the regulations to that effect may reasonably be considered as incidental to the business. The traveling public naturally assume the existence of a custom so reasonable as this. And though the carrier never becomes liable as such for the parcel, he is treated after taking charge of it as a bailee for hire, bound to keep it with ordinary care.⁴

The engagement of an express carrier, who receives a note to be carried into another State where the maker resides, and there presented for payment and collected in case payment is refused, is enforced as one entire contract. In substance it is a double contract; a contract to carry and present for payment; and a contract to prosecute and collect the demand. The carrier's undertaking is as broad as the instructions under which he receives the note; he is bound and liable to the same extent as a bank receiving a note for collection, and he is answerable for the conduct of his agents employed in any part of the business.⁵

§ 91. A bank or an agent, receiving a note or a draft for collection, undertakes to perform the acts necessary to charge the drawer and in-

¹ *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184; *Cary v. Cleveland & Toledo R. R. Co.*, 29 Barb. 35; *Norway Plain Co. v. B. & M. R. R.*, 1 Gray, 271; *Mattison v. New York Cent. R. R. Co.*, 57 N. Y. 552.

² *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548. This case is sufficiently favorable to the carrier.

³ *McAndrew v. Whitlock*, 52 N. Y. 40.

⁴ *Morris v. Third Ave. R. Co.*, 1 Daly, 202; 23 How. Pr. 345; 2 Daly, 103; *Town v. N. & S. R. R. Co.*, 7 Hill, 47. The same rule applies where a ticket agent without reward receives and stores parcels belonging to passengers. *Green v. Birchard*, 27 Ind. 483.

⁵ *Palmer v. Holland*, 51 N. Y. 416; *Ayrault v. The Pacific Bank*, 47 N. Y. 570. In some of the States a collecting agent is not held liable for the conduct of a foreign agent necessarily employed in the business.

dorsers; and his contract makes the agent answerable for the default of the parties employed by him in the business.¹ And though no specific sum be paid for the service, the engagement is treated as a contract; a contract implied from the deposit of the bill or note by a customer with his bank for collection.² The business is incidental to that of the bank; and the service is not really gratuitous because the deposits of a bank, being found to average a fixed sum, are made the basis of discounts; so that indirectly the bank is compensated for the service.³ The rule of liability is now so long settled, that its basis in a consideration of value is not often adverted to in recent cases. Indeed, the bailment of negotiable paper for collection creates a contract of mandate, which must be enforced where no pecuniary benefit can arise from it to the bailee.⁴ A party who undertakes the business of another, and being capable of managing it, neglects to do so with due care, is responsible; and if he be not capable, he is still answerable because he ought not to have engaged in a business beyond his capacity.

In several of the States, a bank receiving a draft or note for collection at a distant place, is bound to send it there to some suitable sub-agent or bank to be collected, and is not answerable for the default of the agent thus necessarily employed in the business.⁵ The second or sub-agent is then held directly liable to the owner for any damages or loss through his neglect.⁶

§ 92. The managers or directors of a corporation are chosen by its members to take a general charge of its affairs and conduct its business.

¹ Edwards on Bills & Notes, 402, 405, 460, 475, 476; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465; *Allen v. Merchants' Bank*, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Naser v. First Nat. Bank*, 116 N. Y. 498; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588; *Saint Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26; *Wingate v. Mechanics' Bank*, 10 Pa. St. 104; *Tyson v. State Bank*, 6 Blackf. 225; *Simpson v. Waldry*, 30 N. W. Rep'r (Mich.), 199; *Mackersy v. Ramsays*, 9 Cl. & Fin. 818.

² *Allen v. Merchants' Bank of N. Y.*, 22 Wend. 215; *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492.

³ *Smedes v. Bank of Utica*, 3 Cowen, 662; 20 John. R. 372; *Foster v. Fuller*, 6 Mass. 58.

⁴ *Durnford v. Patterson*, 7 Martin, R. 460.

⁵ *Dorchester & Milton Bank v. New England Bank*, 1 Cush. (Mass.), 177; *Etna Ins. Co. v. Allen Bank*, 25 Ill. 243; *Wingate v. Mechanics' Bank*, 10 Pa. St. 104; *East Haddam Bank v. Scovill*, 12 Conn. 303; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; *Guelich v. Nat. State Bank*, 56 Iowa, 434; *Daly v. Butchers & Drovers' Bank*, 56 Mo. 94; *Bank of Louisville v. First Nat. Bank*, 8 Baxt. (Tenn.), 101.

⁶ *Bank of Washington v. Tiplett*, 1 Peters, 25; *Fabers v. Mercantile Bank*, 23 Pick. 330; *Lawrence v. Stonington Bank*, 6 Conn. 521.

It is not contemplated that they should devote their whole time and attention to the institution, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in its affairs, have the immediate management. In relation to these officers, the duties of directors are those of control; and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and be tested in a great measure by the facts of the case. Where nothing has come to their knowledge to awaken suspicion as to the fidelity of an officer, ordinary attention to the affairs of the institution is sufficient; but where they become acquainted with any fact calculated to put prudent men on their guard, a degree of care is required commensurate with the evil to be avoided, and a want of that care makes them responsible.¹

The powers conferred upon the directors and the nature of the business have an important bearing upon the duties prescribed to them by law. *E. g.*, the directors of a bank alone have the power to make loans and discounts, and hence it is a negligent omission of duty on their part to permit the business of discounting notes and bills with the funds of the bank to pass into the hands of its officers.² They act for the corporation as a body, and each director has a right to examine its books; he has a right to know what has been done at a meeting of the board when he was not present.³ As a fair inference from this right, a director ought to know the course of its business and the situation of its affairs.⁴ By accepting the trust, he is charged with the duty of taking all reasonable care in the management of the concerns of the bank.

¹ *Percy v. Millandon*, 8 Martin, N. S. 68, 73; *Scott v. Depeyster*, 1 Edw. Ch. 541. See *Briggs v. Spaulding*, 141 U. S. 132; *Louisville Savings Bank v. Caperton*, 87 Ky. 306; *Cutting v. Mahlor*, 78 N. Y. 460; *Onderkirk v. Central Nat. Bank*, 119 N. Y. 263, 272.

² *Bank of Comrs. v. Bank of Buffalo*, 6 Paige Ch. R. 497, 502; *Bank of U. S. v. Dunn*, 6 Peters 51.

³ *The People v. Throop*, 12 Wend. 183; *People v. Pacific Mail S. Co.*, 50 Barb. 280.

⁴ It is undoubtedly the duty of bank directors to use ordinary diligence in acquiring knowledge of the business of the bank. *United Society of Shakers v. Underwood*, 9 Bush (Ky.), 609. Where one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy require of him such a degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. *Hun v. Cary*, 82 N. Y. 65, 71. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise a reasonable control and supervision of its officers. That which they ought by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contract between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that

§ 93. The directors of a corporation entrusted with its funds, and with the management of its business, are certainly liable for losses which happen through gross negligence and inattention to the duties of their trust.¹ They are not answerable for honest mistakes or for errors of judgment.² They do not become sureties for the agents they employ: they receive from the corporation no direct compensation for their services; as stockholders they receive dividends from its earnings with the others, and are hence held liable for ordinary neglect, or for the omission of that care which men of common prudence take of their own concerns.³ The relation between them and their co-stockholders is analogous to that of partners;⁴ they also stand in nearly the same situation as general agents intrusted with the conduct of an important business.⁵

§ 94. The action of the directors, or of the legal quorum required for the transaction of business, is the act of the corporate body itself; the corporation is responsible for their acts, though done in violation of law.⁶ In a general sense, the board of directors act for the benefit of the shareholders; in a legal sense, they do not exercise a delegated authority; in their dealings with others they constitute the corporation.⁷ And

course of business. *Martin v. Webb*, 110 U. S. 7, 15. The board of directors is presumed to have the knowledge possessed by a prior board. *Mechanics' Bank v. Seton*, 1 Peters, 299, 309. It has been held, in an action by a depositor against the directors of an insolvent bank for the conversion by its officers of a special deposit, that the defendants were chargeable with knowledge of such facts as appear upon the books and papers of the bank. *United Society of Shakers v. Underwood*, 9 Bush, 609. But in the courts of this State and of the United States it is settled by recent decisions that knowledge of all the affairs of a bank, or of what its books and papers would show, cannot be imputed to a director for the purpose of charging him with liability; and that there is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director and stockholder. *Rudd v. Robinson*, 126 N. Y. 113; *Briggs v. Spaulding*, 141 U. S. 132; and see *Wakeman v. Dalley*, 51 N. Y. 27.

¹ *Robinson v. Smith*, 3 Paige, 222; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Hun v. Cary*, 82 N. Y. 65.

² *Harman v. Tappenden*, 1 East, 555; *Witters v. Sowles*, 31 Fed. Rep. 1; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630; *Van Dyck v. McQuade*, 86 N. Y. 38; *Williams v. McDonald*, 37 N. J. Eq. 409; *Spering's Appeal*, 71 Pa. St. 11. But as a director is bound to exercise ordinary skill and judgment, he cannot, when loss has been occasioned by his failure to exercise them, excuse himself by claiming that he did not possess them. *Hun v. Cary*, 82 N. Y. 65.

³ *Scott v. Depeyster*, 1 Edw. Ch. 513, 527, 543; *Briggs v. Spaulding*, 141 U. S. 132; *Clews v. Bardon*, 36 Fed. Rep. 617; *Dunn v. Kyle*, 14 Bush (Ky.), 134. See *Preston v. Prather*, 137 U. S. 604.

⁴ *Bailey v. Bancker*, 3 Hill, 188. See *Bissell v. N. S. & N. I. R. Cos.* 22 N. Y. 258.

⁵ *Andrews v. Murray*, 33 Barb. 354; *Richardson v. Abendroth*, 43 Barb. 162.

⁶ *Bank Comrs. v. Bank of Buffalo*, 6 Paige, 497.

⁷ *Burrill v. Nahant Bank*, 2 Metc. (Mass.), 163.

where they allow the business of the corporation, a bank, to be transacted by an officer or financial manager for a length of time, his dealings with third persons will bind the corporate body.¹ The officers of a corporation act as agents, and are liable as such.² Acting with authority, their acts and contracts will bind the corporation.³

§ 95. The directors or managers of a corporation are trustees, answerable to its members or shareholders for any breach of trust, or any misappropriation of the corporate funds, or for any want of good faith in their dealings with its property.⁴ An action may be maintained by a stockholder, in his own behalf, and in behalf of the other stockholders, against the directors acting in bad faith. In equity a director may be treated as the agent or trustee of the stockholders, and held liable on the ground that he acts in a fiduciary capacity.⁵

Officers entrusted with the transfer of the stock on the books of a corporation are liable to any subsequent purchaser of unauthorized or spurious stock, fraudulently issued by them. The right of action arises upon the purchase.⁶ The corporation is also liable to the purchasers of such fraudulent and spurious stock, where it has through its own negligence and misplaced confidence furnished the opportunity and permitted the over-issue; it is liable for the fraud perpetrated by its agent within the letter of his authority in respect to matters which lie peculiarly within his knowledge.⁷

§ 96. *Remedies.* Every misuse or misappropriation of goods intrusted to the mandatary will render him liable, being a breach of the contract under which he receives them.⁸ A misuser of the goods in contraven-

¹ *Smith v. Lansing*, 22 N. Y. 520.

² *Austin v. Daniels*, 4 Denio, 299.

³ *Olcott v. Tioga, R. Co.* 27 N. Y. 546.

⁴ *Butts v. Wood*, 38 Barb. 181; *S. C.* 37 N. Y. 317; *Barnes v. Brown*, 80 N. Y. 527.

⁵ *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Michoud v. Girod*, 4 How. U. S. 554; *Case v. Carroll*, 35 N. Y. 385; *Brinckerhoff v. Bostwick*, 88 N. Y. 52, 59. But an action against an officer of a corporation to recover damages for a fraudulent misappropriation and conversion by him of the corporate property can only be brought by the stockholder in his own name after application to and refusal by the corporation to bring the suit. *Greaves v. Gouge*, 69 N. Y. 154.

⁶ *Shotwell v. Mali*, 38 Barb. 445; *S. C.* 36 N. Y. 200.

⁷ *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Titus v. Prest. etc.* G. W. Turnpike Road, 61 N. Y. 237. The number of shares of the stock being fixed by law, and outstanding in the hands of the shareholders, no one but the transfer agent would be likely to know that a given number of shares represented the genuine stock. A purchaser therefore has a right to act upon his assertion as to that matter of fact, since it rests peculiarly within the knowledge of the agent.

⁸ *De Tollennere v. Fuller*, 1 So. Car. Const. R. 121; *Ulmer v. Ulmer*, 2 Nott and McCord, 489.

tion of the trust will amount to a conversion of them, and this of course renders the mandatary liable for their value, since by such act he appropriates them as his own.¹ After such an unauthorized assertion of title, or the right of control over the property, the mandatary will be charged with every risk attending it.² This follows logically from the fact that any conduct or act which amounts to a conversion renders the mandatary responsible for the property, so that the owner may recover the same, or its value, in an action as he may elect.

§ 97. The owner's remedy, where a mandatary receives money to deliver to another and fails to make the delivery, must depend upon the contract, or upon the relation in which the parties stand to each other. If the money be sent by an agent to the owner according to his instructions, the owner alone may sue for and recover it; the agent retains no interest in the money.³ If the money be placed in the hands of the mandatary by a debtor, to be delivered to his creditor, an action may be brought by either the debtor or the creditor to recover the money; by the debtor because it is his money and he is interested in having it paid over; and by the creditor because the bailee has promised to pay it to him. In both of these cases it is proper to sue on the contract; as it is in all cases where, by the understanding of the parties, the bailee is at liberty to deliver the same amount in other bills.⁴

When the money is delivered to a mandatary in a sealed package, an action of assumpsit for money had and received cannot be maintained without showing that he has broken the seal and appropriated the money to his own use. It is a breach of trust in him to break the seal, and the law will not infer such an act from his mere omission to deliver the package within a reasonable time.⁵

§ 98. Failing to deliver a package of money within a reasonable time, it is the duty of the mandatary to render some account of it; and if on demand he refuses to deliver or to give any account of the package, an action may be safely brought against him for its loss through his neglect.⁶

¹ *Holbrook v. Wright*, 24 Wend. 169; *Brown v. Hotchkiss*, 9 John. R. 361.

² *Sargent v. Giles*, 8 New Hamp. Rep. 325.

³ *Thompson v. Fargo*, 49 N. Y. 188. The contract, though made by the agent, enures to the benefit of the owner; and where the agent has fulfilled his whole duty, and delivered the money as he was directed to, he has no interest in it. The owner must bring the action, or at least a party interested in the fund. *Krulder v. Ellison*, 47 N. Y. 36; *Green v. Clarke*, 12 N. Y. 343.

⁴ *Del. & H. Canal Co. v. Westchester Co. Bank*, 4 Denio, 97. An infant cannot be charged in an action of tort in such a case. *Root v. Stevenson*, 24 Ind. 115.

⁵ *Beardslee v. Richardson*, 11 Wend. 25.

⁶ *Beardslee v. Richardson*, 11 Wend. 25; *Boies v. Hartford, etc.*, R. R. Co., 37 Conn. 272; *Dunn v. Branner*, 13 La. Ann. R. 452; *Newstadt v. Adams*, 5 Duer, 43; *Schwerin*

Under the Code practice, a complaint alleging the facts would be sufficient to establish a cause of action, without giving it a name. It would *prima facie* establish a right to recover in an action in the nature of trover; because a failure to deliver to the owner on demand is evidence of a conversion; and it *is* a conversion where the bailee has the package or goods in his custody at the time the demand is made.¹

§ 99. A delivery of a money package to a boy or to another man to complete the execution of the trust is unauthorized; it is an act of gross negligence.² A misdelivery of the package, that is, a delivery of it intentionally or by mistake through inattention to a wrong party, renders the mandatory liable to the true owner. His good faith will not protect him; he is bound to deliver the property to its owner.³ It will not excuse him to show that he made the delivery under a forged order;⁴ unless he is to be treated with some favor not shown to other bailees. Without regard to the motive, the sale of another man's property without his consent is a conversion of it, and in actions of trover a misdelivery by a bailee has the same effect.⁵ Clearly it casts upon him the burden of showing a loss of the property without any default or want of ordinary care on his part.⁶

§ 100. A trust is often created, and a contract relating to goods is often made, for the benefit of a third person; and that person is permitted to enforce the contract or trust by an appropriate action. His want of knowledge of the trust from the first will not affect his rights; he may affirm it afterwards, and by affirming the trust he acquires the legal right to insist upon its execution; it being beneficial to him, his assent to the trust will be presumed until the contrary appears.⁷ The action of assumpsit is a proper remedy, where a contract can be implied from the facts and circumstances; as it may be where money or goods are sent or delivered by A to B, to be by him paid or delivered over to C, there being a valid consideration between A and C, the party bene-

v. McKie, 5 Robt. 404. The burden of proof is on the bailee, where the goods are not returned or are returned in a damaged condition. Cumins v. Wood, 44 Ill. 416.

¹ Lockwood v. Bull, 1 Cowen, 322.

² Skelley v. Kahn, 17 Ill. 170; Colyar v. Taylor, 1 Coldw. (Tenn.) 372.

³ Willard v. Bridge, 4 Barb. 361; Koykendall v. Eaton, 55 Barb. 188.

⁴ Hawkins v. Hoffman, 6 Hill, 586. See Price v. Oswego & Syracuse R. R. Co., 50 N. Y. 213; McEntee v. New Jersey Steamboat Co., 45 N. Y. 34.

⁵ Hicks v. Cleveland, 48 N. Y. 84.

⁶ Lancaster Co. National Bank v. Smith, 62 Pa. St. 47; Maury & Osborn v. Coyle, 34 Md. 235, 247.

⁷ Cumberland v. Codrington, 3 John. Ch. R. 229, 261; Shepherd v. McEvers, 4 John. Ch. R. 136; Weston v. Barker, 12 Johns. 276.

ficially interested.¹ The plaintiff need not have been privy to the consideration.²

§ 101. The Code has abolished the old forms of action, but has not abolished the previously recognized causes of action.³ Hence in many cases the bailor has an election, now as formerly, to sue on the bailee's implied contract, or to waive the contract and resort to an action in the nature of replevin, case or trover. The choice of the action to be brought is naturally determined by the remedy given by way of arrest in actions of tort.⁴ If the bailee has been guilty of a conversion, an action of trover may be brought against him; as where he has given a mortgage or made an absolute sale of the property, in violation of the trust.⁵ The owner should make his election of remedies with care considering the situation of the parties;⁶ and should not attempt to combine inconsistent causes of action; since by so doing he may lose an advantage otherwise within his reach.⁷ He should also take care not to bring an action of replevin to recover the possession of securities or scrip, so situated that a delivery cannot be adjudged to the plaintiff, the title being in the defendant under a trust; since his true remedy is by a suit in equity.⁸

§ 102. The bailor cannot sue in trover, or in an action in the nature of trover, unless there has been a wrongful conversion of the property; and when he sues in that action, it is not to recover damages for the non-performance of any contract, but to obtain redress for the tort. The contract of bailment may be given in evidence for the purpose of proving the plaintiff's title, and showing that the property was in pos-

¹ *Berly v. Taylor*, 5 Hill, 577; *Sturtevant v. Orser*, 24 N. Y. 538; *Barker v. Bradley*, 42 N. Y. 316; *Barker v. Bucklin*, 2 Denio, 45.

² *Lawrence v. Fox*, 20 N. Y. 268.

³ *DENIO, J.*, in *Hull v. Carnly*, 11 N. Y. 501, 510.

⁴ *Brown v. Treat*, 1 Hill, 225; *Duguid v. Edwards*, 50 Barb. 288; *McGovern v. Payn*, 32 Barb. 83, 91; *Bowen v. True*, 53 N. Y. 640.

⁵ *Sargent v. Gile*, 8 N. H. 325; *Stanley v. Haas*, 40 Cala. 474; *Ogden v. Lathrop*, 1 Sweeny, 643.

⁶ As an illustration, see *Morris v. Rexford*, 18 N. Y. 552; and *Rodermund v. Clark*, 46 N. Y. 354. The law does not permit a party to pursue conflicting and inconsistent remedies. *Sanger v. Wood*, 3 John. Ch. 416; *Bowen v. Mandeville*, 95 N. Y. 237; *Butler v. Wehle*, 4 Hun, 54; *Mills v. Parkhurst*, 126 N. Y. 89; *Bach v. Tuch*, 126 N. Y. 53; *Crossman v. Universal Rubber Co.*, 127 N. Y. 34; *Fowler v. Bowery Savings Bank*, 113 N. Y. 450; *Conrow v. Little*, 115 N. Y. 387; *Moller v. Tuska*, 87 N. Y. 166.

⁷ See *Bowen v. True*, supra; *Smith v. Knapp*, 30 N. Y. 581; *Elwood v. Gardner*, 45 N. Y. 349; *Madge v. Ping*, 71 N. Y. 608; *McGovern v. Payn*, 32 Barb. 83; *Decatur v. Goodrich*, 44 Hun, 3, as to cases in which the order of arrest may be set aside or the defendant discharged from imprisonment on execution.

⁸ *Wheeler v. Allen*, 51 N. Y. 37. See *Western R. R. Co. v. Bayne*, 75 N. Y. 1.

session of the defendant; but the contract is not the foundation of the action. An action in the nature of *assumpsit*, it is true, may be brought directly on the contract implied from the bailment; but an action of *trover* sounding in tort is brought for the wrongful appropriation of the property.¹

The action of *trover* lies against a bailee who, having property in his possession under a stipulation to deliver it at a particular place, on a demand made, refuses to deliver it at all. By denying the right of the bailor he makes himself answerable for the property in the proper action. If the demand is made at the wrong place, and he answer that he is ready to deliver at the right place, there will be no breach of his duty; but an absolute refusal, though made at a place where he is not bound to produce the goods for delivery, will render any further demand unnecessary.² This holds true wherever property is in the hands of a mandatary or general bailee, on a trust connected with its custody or disposition; it must be disposed of, surrendered, or delivered, in the manner, and at the time and place, contemplated in the contract.

§ 103. The general rule that a bailee of property may maintain an action against any stranger or third party for a loss, injury or conversion of the same, applies to a mandatary.³ He holds it under a trust; he has a special or possessory interest in it; he is answerable for it under his contract with the owner. But his right to recover against a third party is not limited or measured by the liability he is under; suing in *trover* he may recover the full value of the property, where he has little if any pecuniary interest in it.⁴ He holds the excess above his special interest in trust for the owner; and hence in an action against the general owner or one claiming under him, he recovers only to the extent of his interest.⁵

¹ *Sydam v. Smith*, 7 Hill, 182; *Smith v. Knapp*, 30 N. Y. 581, 588; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492.

² *Dunlop v. Hunting*, 2 Denio, 643; *Scott v. Crane*, 1 Conn. 255; *Higgins v. Emons*, 5 id. 76; *Slingerland v. Morse*, 8 John. R. 474; *Mason v. Briggs*, 16 Mass. 453; 2 Kent's Comm. 508; *Rogers v. Weir*, 34 N. Y. 463, 471; *Long Island Brewery Co. v. Fitzpatrick*, 18 Hun, 389.

³ *Ante*, §§ 37 and 69; *Kellogg v. Sweeney*, 1 Lansing, 397; S. C. 46 N. Y. 291; *Moran v. Portland*, 35 Maine, 55; *Faulkner v. Brown*, 13 Wend. 63.

⁴ *Bowen v. Fenner*, 40 Barb. 383; *Bass v. Pierce*, 16 Barb. 595; *Paddock v. Wing*, 16 How. Pr. 547; *Buck v. Remsen*, 34 N. Y. 383; *Greene v. Clark*, 12 N. Y. 343; *Little v. Fosset*, 34 Maine, 545; *White v. Bascom*, 28 Vt. 268.

⁵ *Lyle v. Barker*, 5 Bin. 457, 460; *Spoor v. Holland*, 8 Wend. 445; *Russell v. Butterfield*, 21 Wend. 300, 303; *Allen v. Judson*, 71 N. Y. 77; *Fowler v. Haynes*, 91 N. Y. 346; *White v. Allen*, 133 Mass. 423; *Rhoads v. Woods*, 41 Barb. 471; *Seaman v. Luce*, 23 Barb. 240; *Chadwick v. Lamb*, 29 Barb. 518; *Fitzhugh v. Wiman*, 9 N. Y. 559.

§ 104. The rule allows either the general owner of property or the bailee to maintain an action of trover for a conversion of it, or an action on the case for an injury to it;¹ the right to sue is indispensable to each to protect his particular interest, and is given for that purpose. In a bailment determinable at the pleasure of the bailor, either may bring an action of trespass or the action of trover; and as the law does not suffer a defendant to be twice harassed for the same cause, a judgment in the first suit will be a bar to any further action.² As a general rule, the bailee may recover against a third party for injuries to the goods by force or negligence, to the full extent of the loss or damage; having a definite interest, as hirer for a term or for a specified purpose, he recovers damages commensurate with the injury to the property, and holds the excess above his interest in trust for the general owner;³ having the possession of the property as a mere mandatary, liable over under his contract, he also recovers to the full extent of the loss or injury.⁴ And in these cases a recovery by the bailee is a bar to an action by the general owner.

§ 105. The general owner of chattels, let on hire for a definite term, cannot maintain trespass or trover for a conversion or for an injury to them during the continuance of the term, because these actions can only be maintained by a party in possession or having a present right of possession;⁵ and also because the general owner, by a recovery in trover or in trespass of the full value of the property, might thereby overreach and appropriate his bailee's special property; and this he should not be permitted to do.⁶ Hence during the continuance of a bailment on hire for a given term, the general owner's true remedy against a stranger for an injury to the goods is by an action on the case.⁷ But where the bailee has put an end to the contract of bailment by any wrongful act, the general owner may maintain an action of trover for the property, against a purchaser with knowledge, or against

¹ *Smith v. James*, 7 Cow. 328.

² *Greene v. Clark*, 12 N. Y. 343; *Dillenback v. Jerome*, 7 Cow. 294; and as to right of action by bailor, see note to case on pp. 300, 301; and *Chadwick v. Lamb*, 29 Barb. 518; and *Bush v. Lyon*, 9 Cow. 52; *Orser v. Storms*, 9 Cow. 687; *Nicholls v. Bastard*, 2 Crompt. Meeson & Ros. 659.

³ *White v. Webb*, 15 Conn. 302; *Benjamin v. Stremple*, 13 Ill. 466; *White v. Bascom*, 28 Vt. 269; *Little v. Fossett*, 34 Maine, 545.

⁴ *Kellogg v. Sweeney*, supra; *Moran v. Portland*, supra.

⁵ *Gordon v. Harper*, 7 T. R. 9, 12; *Swift v. Moseley*, 10 Vt. 208; *Thorp v. Burling*, 11 John. R. 285; *Bush v. Lyon*, 9 Cowen, 52; *Forth v. Pursley*, 82 Ill. 152.

⁶ *Hasbrouck v. Lounsbury*, 26 N. Y. 598.

⁷ *Gordon v. Harper*, supra; *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Howard v. Farr*, 18 N. H. 457.

the bailee;¹ and trespass or replevin against the purchaser in bad faith who takes the property, under the unauthorized sale.²

§ 106. *Burden of Proof.* In actions against the mandatary, as in others, the burden of proof rests on the plaintiff to establish his cause of action, by proving each material fact necessary to create the liability.³ If the plaintiff in an action of case alleges the delivery of money, inclosed in a letter, to the defendant, and that he undertook and promised to take care of and carry the same safely from one place to another, and then deliver the package to the plaintiff; and that, although a reasonable time had elapsed, the defendant had not done so; the plaintiff will be bound to show, among other things, that the money was lost by the defendant's negligence, or could not be obtained on request. By showing a demand and refusal to deliver the package after a reasonable time, he will be entitled to recover, unless the defendant account for the loss by showing the package lost without fault on his part, that is, without gross negligence.⁴ The evidence that the defendant refused to give any information in respect to the package, would change the burden of proof from the plaintiff to the defendant; or, submitted to the jury without explanation, it would be sufficient to render the mandatary liable.

§ 107. When the mandatary has converted the property to his own use, and an action in the nature of trover is brought against him for the conversion, the burden of proof lies on the plaintiff to show that the defendant has assumed to himself the property and right of disposing of the plaintiff's goods.⁵ The action assumes that the defendant came lawfully into possession of the goods, and it is sustained by showing a breach of the trust, or an abuse of such lawful possession. This familiar principle is applicable to *choses in action* as well as to chattels. If the mandatary, intrusted with the goods of another, puts them into the hands of a third person, contrary to orders, it is a conversion.⁶ So, if he be intrusted with a promissory note to be used in a specified manner, and he dispose of it differently, it is a misuse or disposition of the note contrary to orders, which will sustain the action.⁷ Even where the

¹ Swift v. Moseley, 10 Vt. 208; Morse v. Crawford, 18 Vt. 499; Camp v. Mitchell, 34 Miss. 449.

² Ely v. Ehle, 3 N. Y. 506.

³ Williams v. East India Co., 3 East R. 192; Doorman v. Jenkins, 2 Adolph and Ellis R. 80; Hayes v. Kedzie, 11 Hun. 577.

⁴ Beardslee v. Richardson, 11 Wend. 25; Coykendall v. Eaton, 55 Barb. 188; Newstadt v. Adams, 5 Duer, 47; Boies v. Hartford, etc., R. R. Co., 37 Ct. 272.

⁵ Baldwin v. Cole, 6 Mod. 212; McCombie v. Davies, 6 East. 540.

⁶ Syed v. Hay, 4 Term Rep. 260; Kowing v. Manly, 49 N. Y. 193.

⁷ Murray v. Burling, 10 John. R. 172; Decker v. Mathews, 5 Sand. 439; 12 N. Y.

plaintiff has repossessed himself of the thing bailed, the action may be sustained for the breach of trust, which is a conversion ;¹ and the amount of the recovery will depend upon the nature of the case. If it be a negotiable note, which has been transferred for value to a *bona fide* holder, and afterwards paid by the plaintiff, the recovery will be for the face of the note ; and the plaintiff may recover the face of the note without proving payment.²

§ 108. In order to maintain an action in the nature of trover against a mandatary, who always comes legally into possession of the property, it is necessary to show a demand and refusal, or an actual conversion.³ The rule was held differently where the possession itself was tortious, which is an actual conversion.⁴ The general principle is that a demand and refusal, as against one who has chattels in trust for another, are *prima facie* evidence of a conversion ;⁵ but this evidence may be overcome by counter testimony, going to negative the presumption of a conversion arising from such refusal on demand. The effect of the demand will depend upon the present relation of the parties at the time it is made ; if the defendant refuse to deliver the goods according to contract, he having the possession, he becomes liable for them.⁶

§ 109. An action in the nature of trover against a bailee does not

313; *Thayer v. Manley*, 73 N. Y. 305; *Powell v. Powell*, 71 N. Y. 71; *Develin v. Coleman*, 50 N. Y. 531; *Hynes v. Patterson*, 28 Hun, 528; *Bunger v. Roddy*, 70 Ind. 26.

¹ 2 Esp. N. P. 190, 191; *Ingalls v. Lord*, 1 Cowen R. 240; ante, § 61; *Brewster v. Silliman*, 38 N. Y. 423, 428.

² 2 Esp. N. P. 190, 191; *Ingalls v. Lord*, 1 Cowen R. 240; *Decker v. Mathews*, supra.

³ This is the general rule where the original possession of the defendant was lawful and not tortious. *Loveless v. Fowler*, 79 Ga. 134; *Sager v. Blain*, 44 N. Y. 445, 448; *Goodwin v. Wertheimer*, 99 N. Y. 153; *Yeager v. Wallace*, 57 Pa. St. 365; *Carleton v. Lovejoy*, 54 Me. 445; *Ryerson v. Kauffield*, 13 Hun, 387.

⁴ *Bates v. Conkling*, 10 Wend. 389; *Brown v. Cook*, 9 John. R. 361. A wrongful taking or a wrongful sale constitutes an actual conversion, and no demand before suit is necessary. *Levi v. Booth*, 58 Md. 305; *Hake v. Bueli*, 50 Mich. 89; *Howitt v. Estelle*, 92 Ill. 218; *Rhoades v. Drummond*, 3 Col. 374; *Waller v. Bowling*, 108 N. C. 289; *Smith v. Jensen*, 13 Col. 213; *Follett v. Edwards*, 30 Ill. App. 386; *Blakey v. Douglass*, 10 East. Rep'r (Pa.) 746. Where there has been an actual conversion a demand and refusal are unimportant. *Knevick v. Rogers*, 26 Minn. 344.

⁵ *Packard v. Getman*, 4 Wend. 613.

⁶ 1 Taunt. 391; 4 Esp. 157. The use of the property in a manner different from that agreed upon with the owner of it; *Beach v. Raritan & Del. Bay R. R. Co.*, 37 N. Y. 457; *Malone v. Robinson*, 77 Ga. 719; or the unauthorized use of it; *Gove v. Watson*, 61 N. H. 136; is a conversion of it. An unauthorized sale of the property by the pledgee is a conversion; *Lawrence v. Maxwell*, 53 N. Y. 19; unless waived or not objected to; *Bryan v. Baldwin*, 52 N. Y. 232. And upon the same principle a pledge of property by one to whom it was entrusted for sale is a conversion of the property; *Nichols v. Gage*, 10 Oregon, 82. So if an agent entrusted with property to sell at a price to be approved by his principal sells without such approval, he is liable for a

lie for negligence, nor for goods lost or taken from him;¹ it proceeds upon the assumption that he has usurped the right of property over them, by converting them to his own use.² Coming lawfully into the possession, it must be shown that he has sold or otherwise converted the goods.³ Where, however, the title is in the plaintiff, and it is shown that the property was wrongfully taken from his possession, the burden will be cast upon the defendant of showing that *he* came to the possession of the property, by purchase or bailment, and without any fault on his part.⁴ This again, it seems, will transfer the burden of proof to the plaintiff, to show a demand of the property, and a refusal, or some other act of conversion.⁵

§ 110. The action, in the nature of assumpsit for money had and received, may be brought against a bailee or trustee who has converted the property into money; but in order to maintain this action against two trustees jointly for money had and received to the use of the *cestui que trust*, the plaintiff must prove a joint promise, either express or implied. The fact that each of the defendants, who are trustees under an assignment for the benefit of creditors, has admitted the receipt of funds equal to the demand of the plaintiff, one of the creditors, and expressed his willingness to distribute the same according to the terms of the trust, does not raise an implied promise, such as will support an action at law against the defendants jointly, as for money had and received. Each trustee is answerable for his own acts only; this is the general rule; and the law will not imply a joint promise on the separate statements or admissions of each.⁶

Property delivered and received as money will support the action precisely the same as if money itself had been delivered and received.⁷

conversion. *Comley v. Dazian*, 114 N. Y. 161. A refusal to deliver on demand is evidence of a conversion at the time of the refusal. *Roberts v. Berdell*, 52 N. Y. 644. Refusal to comply with a proper and formal demand is not *ipso facto* conversion. It is only a fact from which a wrongful conversion may be inferred, provided the circumstances are such as to warrant that inference. *Blakey v. Douglass*, 10 East. Rep'r (Pa.) 746; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; *Andrews v. Shattuck*, 32 Barb. 396.

¹ *Salk*. 655; 5 *Burr*. 2825; *Bromley v. Coxwell*, 2 B. & P. 438; *Cairns v. Bleecker*, 12 Johns. 300; *Jervis v. Jolliffe*, 6 Johns. 9; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492.

² *Storm v. Livingston*, 6 John. R. 44.

³ *Barrett v. Warren*, 3 Hill, 348; *Acker v. Campbell*, 23 Wend. 372; *McCarty v. Vickery*, 12 John. R. 348.

⁴ *Barrett v. Warren*, 3 Hill, 348, 351.

⁵ *Bates v. Conkling*, 10 Wend. 389.

⁶ *De Forest v. Jewett*, 2 Hall R. 130.

⁷ *Ainslee v. Wilson*, 7 Cowen R. 662.

And it is not necessary in all cases to give positive evidence that the defendant has received money belonging to the plaintiff; but where, from the facts proved, it may fairly be presumed the defendant has received the plaintiff's money, the plaintiff may recover in this action for money had and received to his use.¹ In general, this action cannot be supported unless the defendant has in fact received money to the plaintiff's use.²

§ 111. A recovery in trover for the value of goods, and a satisfaction of judgment, vests the property in the defendant; because this gives to the plaintiff, at his suit, an equivalent for his property in damages. There is no dissent from this rule, as a single affirmative proposition.³ In some of our States, the recovery of the judgment alone is held to work a transfer of the property; on the ground that by bringing this action the plaintiff elects to convert his demand into a judgment for the value of the property, which becomes a chose in action transferable like any other security.⁴

In many cases the plaintiff has an election to bring assumpsit, trespass, replevin, or trover; and as a rule he is held to the logical consequences of his election; he recovers subject to the defenses and principles applicable to that form of action which he adopts.⁵ On the same ground, the plaintiff, by adopting the action of trover, is said to elect to recover damages in lieu of his property—an inference which would be of controlling weight in favor of anybody but a wrong-doer.

The title is not changed by the act of conversion, nor by the exercise of acts of ownership over the property. The owner of timber may re-

¹ Tuttle v. Mayo, 7 John, R. 132.

² Beardsley v. Root, 11 John. R. 465.

³ Osterhout v. Roberts, 8 Cowen, 43; Curtis v. Groat, 6 John. R. 168; Thurst v. West, 31 N. Y. 210, 215; Sharp v. Gray, 5 B. Monroe, 4; Jones v. McNeil, 2 Bailey S. C. 466; Lovejoy v. Murray, 3 Wallace, 1-19; 2 Kent's Com. 387, 388; Marsden v. Cornell, 62 N. Y. 215, 220; Curtis v. Groat, 6 Johns. 168; Thayer v. Manley, 73 N. Y. 305, 309.

⁴ Floyd v. Browne, 1 Rawle. 121; Fox v. The Northern Liberties, 3 Watts & Serg. 103; Carlisle v. Burley, 3 Maine, 250; Loomis v. Greene, 7 Maine, 386; Murrell v. Johnson, 1 Henning & Munford, 450; Hunt v. Bates, 7 R. I. 217; Buckland v. Johnson, 15 Com. Bench, 145, 157. The recovery of an unsatisfied judgment for a conversion does not have the effect of transferring title to the property converted in Connecticut. Atwater v. Tupper, 45 Conn. 144.

⁵ Hunter v. Prinsep, 10 East. 378; Frothingham v. Morse, 45 N. H. 545; Baker v. Cory, 15 Ohio, 9; Coffey v. National Bank of Mo., 46 Mo. 140; May v. Le Claire, 78 U. S. 217. If the plaintiff waives the tort and sues in assumpsit, the defendant is not permitted to set up his tort to defeat the action, and the recovery of a judgment will bar a further action *ex delicto* by the plaintiff. Putnam v. Wise, 1 Hill, 240, note; Hill v. Davis, 3 N. H. 384; Stockett v. Walkin's Admrs., 2 Gill. & J. 326, 342; May v. Le Claire, 78 U. S. 217.

claim it when made into shingles,¹ or converted into coal,² notwithstanding it has lost its primitive form. So long as he can prove its identity, he may follow and retake it in whatever new shape it may have been wrongfully made to assume. By bringing his action of trover, the owner makes his election to demand the value of the property.³ But proof that the defendant refused to deliver it on demand shows a conversion at the time when the demand is made; the refusal being itself a conversion, it is doubtful whether the defendant would be permitted to show a prior act of conversion with a view to a reduction of damages; since that would be permitting him to found a defense upon his own wrongful act.⁴

§ 112. As a general rule, the measure of damages in the action of trover is the value of the property at the time of the conversion, with interest from that date; a rule which is applied in all cases where the property has a fixed value.⁵ Interest on the value from the date of the conversion is a necessary part of a complete indemnity.⁶

The law cannot favor a wrong-doer; hence where the plaintiff is deprived of some special use of the property, or where the property naturally fluctuates in value like stocks, the owner has been allowed to recover the highest value of the things wrongfully converted, down to the day of the trial; certainly he is not limited to the value of the property on

¹ *Betts and Church v. Lee*, 5 John. R. 349; 5 Hen. VII. 15; 12 Hen. VIII. 10; *May v. Le Claire*, 78 U. S. 217. See *Silbury v. McCoon*, 3 N. Y. 379; *Cavin v. Gleason*, 105 N. Y. 256, 261; *Guckenheimer v. Angevine*, 81 N. Y. 394, 397; *Newton v. Porter*, 69 N. Y. 133, 137.

² *Curtis v. Groat*, 7 John. R. 168; *Babcock v. Gill*, 10 John. R. 237.

³ *Dillingback v. Jerome*, 7 Cowen R. 294; *Kennedy v. Strong*, 14 John. R. 128; *Baker v. Wheeler*, 8 Wend. R. 505; *Suydam v. Jenkins*, 3 Sand. Superior Ct. R. 628, and the cases there cited.

⁴ As the wrongful conversion of property does not deprive the owner of his title, he may transfer that title to another, who, upon a demand and refusal of the person in possession to surrender the property, may maintain an action against him for the conversion. Although the previous owner of the property might have brought an action for conversion, he was not bound to do so, and the previous wrong on the defendant's part is no excuse for his failure to deliver it when demanded by the second owner. There is no doubt but that there may be a second conversion. *Serat v. Utica, etc., R'y Co.*, 102 N. Y. 681.

⁵ *Andrews v. Durant*, 18 N. Y. 496; *Beecher v. Denniston*, 13 Gray (Mass.), 354; *Dixon v. Caldwell*, 15 Ohio St. 412; *Kennedy v. Strong*, 14 John. R. 128; *Clark v. Pinney*, 7 Cowen R. 681; *Neiler v. Kelly*, 69 Penn. St. 403; *Simpson v. Alexander*, 35 Kansas, 225; *Allen v. Kinyon*, 41 Mich. 281; *Hopper v. Haines*, 71 Md. 64.

⁶ *McCormick v. Penn. Central R. R. Co.*, 49 N. Y. 303, 315; *Hurd v. Hubbell*, 26 Conn. 389, 483; *Yates v. Mullen*, 24 Ind. 277; *Negus v. Simpson*, 99 Mass. 388. See *Mercer v. Vose*, 67 N. Y. 56; *McCollum v. Seward*, 62 N. Y. 316.

the day of the conversion;¹ since that rule would give the wrong-doer the opportunity to take another man's property and hold it with a view to an increase in its value, and would give to the trespasser all the advantages of a purchaser under a fair contract of sale. Damages for the use of the property, in its original shape, are legitimate;² and no reason can be assigned to prevent the owner from recovering the value of such use, instead of interest on the value of the property. In replevin the jury are required to assess the present value of the property, and the damages for its detention.

Special damages are not often recoverable; being duly alleged, they may be recovered when they are the natural or proximate consequence of the wrongful act;³ as where money and time are expended in searching for chattels wrongfully taken or appropriated.⁴ Special damages resulting from the effect produced upon the owner's business are too remote;⁵ unless the action is brought to recover the team or the tools with which he prosecutes his business.⁶

By reason of a certain difference in the natural bias of mind existing among jurists, the rule of damages appears in two forms or phases; the affirmative form gives to the owner the value of his property at the time it was taken from him, with interest from that date, as an indemnity for the injury he has sustained; and the negative form, or the exceptions from that rule, seem to be framed with the design of preventing the wrong-doer from gaining any advantage through his wrongful act. Hence the affirmative or general rule applies where the conversion takes place without malice, or without any intent to invade the rights of property; and it is evident that the tendency of opinion

¹ *Romaine v. Van Allen*, 26 N. Y. 309; *Burt v. Dutcher*, 34 N. Y. 493; *Scott v. Rogers*, 31 N. Y. 676; *Musgrove v. Beckendorff*, 53 Penn. St. 310; *Ellis v. Wire*, 33 Ind. 127; *Lobdell v. Stowell*, 51 N. Y. 70; *Markham v. Jaudon*, 41 N. Y. 235; *Groot v. Gile*, 51 N. Y. 431. In the absence of circumstances calling for exemplary or special damages, the true measure of damages in an action for the conversion of stocks is the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace it. *Wright v. Bank of Metropolis*, 110 N. Y. 237; *Colt v. Owens*, 90 N. Y. 368; *Gruman v. Smith*, 81 N. Y. 25; *Galigher v. Jones*, 129 U. S. 193. For the measure of damages under the statutes of California, see Cal. Civil Code, § 3336.

² *Shotwell v. Wendover*, 1 John. R. 65; *Allen v. Fox*, 51 N. Y. 562; *Suydam v. Jenkins*, 3 Sand. 614, 621; *Haviland v. Parker*, 11 Mich. 103.

³ *Starkey v. Kelly*, 50 N. Y. 677.

⁴ *Bennett v. Lockwood*, 20 Wend. 223; *McDonald v. North*, 47 Barb. 530; *Forsyth v. Wells*, 41 Penn. St. 291; *Davis Sewing Machine Co. v. Best*, 50 Hun, 76; *Arzaga v. Villalba*, 85 Cal. 191.

⁵ *Brizsee v. Maybee*, 21 Wend. 144.

⁶ *Bodley v. Reynolds*, 8 Q. B. 779. See *Hurd v. Hubbell*, 26 Conn. 389.

is towards a uniform rule, giving the owner the value of his property with interest from its conversion, or the value with interest from a reasonable time thereafter.¹

Under the English practice the court will sometimes stay the proceedings, on the defendant's paying the costs and restoring the subject of controversy, **where** no special damages can be claimed for the conversion, and where the value of the property remains unchanged. Though this practice be scarcely known in this country, it assumes the usual rule of damages, and also allows the plaintiff an opportunity to recover damages for the detention as well as for the depreciation of the property.² In the action of replevin, this practice and the rule with its qualifications are manifestly convenient and just;³ and the same result may be wrought out under our practice by an offer to allow judgment.⁴

§ 113. Notwithstanding the Code has obliterated the distinction between actions at law and suits in equity, and abolished the well-known forms of actions previously used in this State, the remedies by suit remain still essentially unchanged;⁵ because the principles of law remain as heretofore. The plaintiff must allege facts that constitute a cause of action, and the allegations of his complaint must show a right of recovery under principles previously applied to the actions of replevin, case, trover and the others.⁶ The statement contained in his complaint must include every fact necessary to establish a right of action known to the law. And, since the principles of the common law, as well as the principles of pleading under it, must be studied and learned chiefly from the decisions which have been made under forms of action now disused, it is evident that the plaintiff's complaint must be drawn with

¹ *Matthews v. Coe*, 49 N. Y. 57; *Baker v. Drake*, 53 N. Y. 211, overruling *Markham v. Jaudon*; *Wyman v. Amer. Powder Works*, 8 Cush. 168; *Robinson v. Barrows*, 48 Maine, 186; *Cushman v. Hayes*, 46 Ill. 145; *Bates v. Stansell*, 19 Mich. 91; *Page v. Fowler*, 39 Cal. 412; *Pinkerton v. Manchester R. R. Co.*, 42 N. H. 424.

² *Fisher v. Prince*, 3 Burr. 1363; *Whitlen v. Fuller*, 2 W. Black, 902; *Earle v. Holderness*, 4 Bing. 462. See *Stevens v. Low*, 2 Hill, 132.

³ *Allen v. Fox*, 51 N. Y. 562. Our practice is different. *Brewster v. Silliman*, 38 N. Y. 423, 428.

⁴ Code of Civil Pro., § 738. The offer may be made to allow judgment for the property; but it must in all cases be explicit and definite. *Marble v. Lewis*, 53 Barb. 432; *Tompkins v. Ives*, 36 N. Y. 75.

⁵ *Hall v. Southmayd*, 15 Barb. Rep. 32; *Horner v. Wood*, id. 371; *Barker v. Russell*, 11 Barb. Rep. 303; *Rodgers v. Rodgers*, id. 595. A suit in equity and an action at law may be combined. *Davis v. Morris*, 36 N. Y. 569; Code of Civil Pro. § 484.

⁶ *Boyce v. Brown*, 7 Barb. Rep. 80, and the cases there cited; *Eldridge v. Adams*, 54 Barb. 417.

at least a tacit reference to the requisites of pleading used in some one of those forms.¹ Though the statute has abolished the forms, it has not separated them from the adjudications which have blended them together through a long course of years. The terms, *assumpsit*, *case*, *trover*, etc., convey the idea of distinct and well-known causes of action, so that it is still more convenient to use them in speaking of legal principles than to adopt the circumlocution necessary to express the same ideas in popular language. The single term, *trover*, which has been so commonly used as a remedy for the violation of the contract of mandate, describes a cause of action brought for the unlawful detention or conversion of goods; in which the plaintiff's right to them, their value, and the defendant's conversion of them, were put in issue and necessary to be proved.² The plaintiff must have either a general or special property in the goods, and a right to the immediate possession; and where the defendant is a mandatary, it must be shown that he has been guilty of some breach of trust, which the law regards as a conversion of the property to his own use. We describe the suit accurately under the new procedure, by calling it an action in the nature of *trover*.³

§ 114. *The Contract, how determined.* The death of the mandatary, leaving the mandate wholly unexecuted, works no change in the title to the property;⁴ and where the trust is of a personal nature, his representatives must have the liberty of restoring the property and thus terminating the contract.⁵ And unless by the terms of the bailment

¹ *Childs v. Hart*, 7 Barb. Rep. 370; *Rayner v. Clark*, 7 Barb. 581; *Garvey v. Fowler*, 4 Sand. R. 665.

² *Tharpe v. Stallwood*, 5 Mann. and Gr. 761; *Armory v. Delamirie*, 1 Strange, 505; *Meny v. Greene*, 7 Mees. and W. 623; *Tell v. Beyer*, 38 N. Y. 161. In an action for conversion the allegation of value is not a traversable one, and even on default, where all the traversable averments are taken as admitted, the plaintiff must prove his damages if he seeks to recover more than a nominal amount. *Connoss v. Meir*, 2 E. D. Smith, 314, and cases cited; *Raymond v. Traffarn*, 12 Abb. Pr. 52; *McKensie v. Farrell*, 4 Bosw. 192, 202; *De Graaf v. Wyckoff*, 13 Daly, 366; *Starr v. Cragin*, 24 Hun, 177; *Duffus v. Bangs*, 61 Hun, 23. See *Thompson v. Halbert*, 109 N. Y. 329.

³ *The Manhattan Co. v. Bentley*, 13 Barb. Rep. 641; *Conway v. Bush*, 4 Barb. Rep. 564. The cause of action must be stated in the complaint, and the defense properly pleaded, and the judgment must follow according to the allegations and proof; the Code has not changed this settled rule of practice. *Wright v. Delafield*, 25 N. Y. 266. And as a rule, a pleading which is sufficient in the action of *assumpsit* at common law, is sufficient under the Code. *Farron v. Sherwood*, 17 N. Y. 227. Suing on a special contract which he has fulfilled, plaintiff may recover on the old count of *indebitatus assumpsit*. *Hosley v. Black*, 28 N. Y. 438.

⁴ *Hurd v. West*, 7 Cowen, 752.

⁵ *Roulston v. McClelland*, 2 E. D. Smith, 60.

some third party has acquired a vested interest in the property, the bailee's executor or administrator will be justified in restoring the same to the mandator.¹

On his death the mandatary's goods and effects pass into the custody of his legal representatives, and although a personal trust will not thus devolve upon them, they will be bound to take care of the property coming into their hands, and should be held liable for at least an equal degree of care as that required of the deceased in keeping it. Though they do not come under the mandatary's exact contract, they do become bailees or custodians of the property in the due course of business. In respect of an ordinary contract, it is their legal duty to fulfill it according to its terms; the estate is under the obligations of the contract, and entitled to the moneys growing due thereon.² In respect to property held in trust, the rule is that it does not pass to the legal representatives, but goes to the party for whom it is held.³ So far as accrued liabilities are concerned, the legal representatives are liable; they represent the deceased and must answer for his debts and torts beneficial to the estate, *e. g.* the conversion of personal property.⁴ The law makes no provision for the execution of a specific trust by the legal representatives; it leaves them to the liabilities growing out of the relation voluntarily assumed by them.⁵

They receive the trust property as individuals;⁶ it is not to be deemed assets in their hands, unless the liability of the deceased has really assumed the form of legal liability. In some cases the character of the property will depend upon the facts to be ascertained on investigation;⁷ and here they will receive it conditionally. As between themselves, neither is entitled to exclude the other from the custody or possession of the property.⁸

§ 115. When the mandatary has money in his hands due to a third person, and dies, he leaves his estate indebted for that amount, and it is the duty of his legal representatives to discharge the debt;⁹ but where

¹ *Carle v. Bearce*, 33 Maine, 337; *Britton v. Aymar*, 23 La. Ann. R. 63.

² *Riblet v. Wallis*, 1 Daly, 360, 365.

³ *Moses v. Murgatroyd*, 1 John. Ch. 119. The property will not pass to an assignee in bankruptcy. *Kip v. Bank of N. Y.*, 10 John. R. 63.

⁴ *Brocket v. Bush*, 18 Abb. Pr. 337.

⁵ See *Banks v. Wilkes*, 3 Sand. Ch. 99; *Bowman v. Rainetoux & Sabbatton*, 1 Hobb. Ch. 150.

⁶ The statute specifies what shall be assets in their hands, not including any such trust property. See *Levin v. Russell*, 42 N. Y. 251.

⁷ *Scoville v. Post*, 3 Edw. Ch. 203; *Champney v. Blanchard*, 39 N. Y. 111.

⁸ *Burt v. Burt*, 41 N. Y. 46.

⁹ Ante, §§ 86, 97.

he has a package of money or goods in his possession for a third party whose property they are, and dies, his legal representatives acquire only the bare custody of the articles; they come into the possession of the property without any express authority from the owner, and are to be held liable for it, not as executors or administrators, but on the same general ground as the finder of goods.¹

§ 116. Under the general rule of the common law, the death of one of two or more persons jointly authorized to act for another arrests the execution of the power.² And hence where joint mandataries are authorized to do some private act requiring their consultation and concurrence, the death of one dissolves or puts an end to the power;³ in other words, where an authority to act in a matter of a private nature is conferred by the principal upon more than one person, all must act in the execution of the power, unless it is given in such terms as will authorize its execution by a less number.⁴ An authority conferred upon a firm cannot be properly executed by the members that remain in business, after its dissolution;⁵ and an authority given by a firm is withdrawn by a change in its members with notice.⁶

§ 117. The death of the mandator puts an end to all authority to enter upon any new business or engagements in his name. Money or personal property in the hands of an agent or mandatary, at the death of the principal, goes to his representatives; and where the authority to complete the mandate is thus terminated, the law imposes upon the mandatary the duty to restore the thing bailed to the party who represents the estate, or to the owner where the property belongs to some other party. The law will imply an obligation to surrender the trust in a way that shall be agreeable to equity;⁷ and it seems the acts of an agent or mandatary, before notice of the death, done in good faith in the execution of the contract, will be held binding upon his principal's estate;⁸ as where he completes a transaction or receives a payment on behalf of his principal.⁹

¹ Ante, §§ 19, 90, 100, 103; *McGehee v. Mahone*, 37 Ala. 258.

² *Martine v. International Life Ins. Society*, 53 N. Y. 339; *Stisnermann v. Cowing*,

7 John. Ch. 275; *Tooke v. Hollingworth*, 5 Term R. 215.

³ *Sinclair v. Jackson*, 8 Cowen, 543.

⁴ *Hawley v. Keeler*, 53 N. Y. 114, 121.

⁵ *Martine v. International Life Ins. Soc.*, 53 N. Y. 339; *Hamilton v. Mutual Life Ins. Co.*, 9 Blatch. 235.

⁶ *Callanan v. Van Vleck*, 36 Barb. 324; 41 N. Y. 619.

⁷ *Farrow v. Bragg*, 30 Ala. 261; 1 Bell's Com. § 413, 4th ed.

⁸ *Nicolet's Admr. v. Pillot*, 24 Wend. 240. The agent ought to be protected. See *Howe v. Buffalo, N. Y. & E. R. R. Co.*, 37 N. Y. 297.

Cassiday v. McKensie, 4 Watts & Serg. 282; *Carriger v. Whittington*, 26 Mo. 313.

A power of sale, coupled with an interest in goods, capable of being executed in the name of the agent, may be executed after the principal's death; as where a factor makes advances upon and receives goods for sale, and is not reimbursed on the death of his principal.¹ The factor has an interest in the property, like that of pledgee, and a sale by him, contemplated from the first, is only a reasonable mode of realizing his interest in the goods.

An agency cannot outlive the principal;² under this rule of the common law it is evident that an agent or mandatary can only be protected in such acts and dealings in the business entrusted to him as the situation naturally calls for. He must preserve the property and surrender it to the parties entitled to receive it.

§ 118. A mandate may include an authority to contract; and as the power is withdrawn by the death of the mandator, it is often necessary to fix the precise time when the contract is complete. In a sale negotiated by letter, the offer to sell, standing open and unretracted, becomes a contract of sale as soon as it is accepted; even though the person making the offer die before he receives knowledge of the fact.³ As in other

¹ Edwards on Factors and Brokers, §§ 86, 87; Ish v. Crane, 8 Ohio St. 520; Story on Agency, § 496.

² Hunt v. Rousmanier, 8 Wheat. 174, 201; Smout v. Ilberry, 10 Mees. & Welsby, 1; Megary v. Funtis, 5 Sand. 376; Park v. Hammond, 6 Taunt. 495.

³ Mactier v. Frith, 6 Wend. 103; Vassar v. Camp, 11 N. Y. 441; Taylor v. Merchants' Fire Ins. Co., 9 How. U. S. 370; Trevor v. Wood, 36 N. Y. 307; Pothier, *Trait du Contrat de Vente*, § 2, Art. 3, No. 32. The passage from Pothier is as follows: In order that this consent may take place where the contracting parties are in different places, it is necessary that the will of the party who has written to the other, proposing a sale, should continue until his letter has reached the other party and he has declared that he accepts the offer. This will is presumed to have continued, if nothing appears to the contrary. But if I have written to a merchant at Livourne a letter proposing to sell him a particular article for a specified price, and before my letter has been received by him, I write to him a second declining to make the contract, or if before that time (*i. e.*, before my letter is received and the offer contained in it accepted) I am dead, or have lost the use of my reason, although the merchant at Livourne, ignorant of my change of will, death, or loss of reason, should, on receiving my letter, accept the offer contained in it, there would be no contract of sale; for my will not having continued down to the time when this merchant had received my letter and accepted the proposition contained therein, there was not that concurrence or meeting of our minds required to make a contract of sale. This is the opinion of *Bartholus* and of the other doctors of the civil law quoted by *Bruneman*, *ad. l. 1, § 2, ff. de contract empt*, who have correctly rejected the contrary opinion of the commentary *ad dictam legem*. This doctrine, says Mr. Justice Marcy, which presumes the continuance of a willingness to contract, after it has been manifested by an offer, is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless storehouse of jurisprudence; it is found in the common law; indeed, it exists, of necessity, wherever the power to

cases, the contract is complete as soon as the minds of the parties meet. Of necessity the person making the offer to sell by letter must be considered as making it during every instant of time his letter is passing to its destination ; and if the party addressed presently or within a reasonable time write a letter of acceptance and mail it, the contract is complete. It is necessary that the minds of the contracting parties should meet on the subject and terms of the contract, but not necessary they should know that they meet in order to create the contract.¹ The mailing of the letter of acceptance properly addressed, or the sending of a telegram where the offer is made by telegraph, completes the contract.²

contract exists in parties separated from each other. (6 Wend. 115.) In *Vassar v. Camp*, decided in the Court of Appeals in this State, Mr. Justice Selden observes : This precise question has been so fully considered in several modern cases, that it would be a work of entire supererogation to discuss it here. It arose in England in the case of *Adams v. Lindsell* (1 Barn. and Ald. 681). In that case an offer to sell wool was made through the mail. The offer was received by the plaintiffs on the 5th of September, who wrote and mailed their answer, accepting the offer, the same evening ; but this answer was not received until the 9th of September by the defendants, who in the meantime, supposing their offer had not been accepted, had sold the wool to other parties. The action was for the non-delivery of the wool ; and if the contract was regarded as consummated on the 5th of September, when the answer accepting the offer was mailed, the defendants were liable ; but if not until its receipt on the 9th, then no liability attached. The court held unanimously that the contract became obligatory on the 5th, when the answer of the plaintiffs was deposited in the mail. In the case of *Mactier v. Frith*, the same question arose in this State, and was elaborately discussed by our late Court of Errors. The court in that case, by an almost unanimous vote, affirmed the doctrine of *Adams v. Lindsell*, in opposition to that of *McCulloch v. The Eagle Insurance Company* (1 Pick. 278), in which the Supreme Court of Massachusetts had adopted a different rule. The decision in *Mactier v. Frith* has since been followed in our own State in the case of *Brisban v. Boyd* (4 Paige, 17) ; in the State of Connecticut, in the case of *Averill v. Hedge* (12 Conn. 424) ; in Pennsylvania, in the case of *Hamilton v. Lycoming Ins. Co.* (5 Barr. 339) ; and in Georgia, in *Levy v. Coke* (4 Georgia R. 1). The question has again arisen in England, and been passed upon by the House of Lords there, in the case of *Dunlop v. Higgins* (12 Jurist. 295). In that case, the case of *Adams v. Lindsell* is referred to and confirmed in the most decided and unequivocal terms. The doctrine of this case, therefore, and that of *Mactier v. Frith*, must be considered as too firmly settled, both in this country and in England, to be shaken or doubted. It is moreover maintained, in the cases referred to, by the most satisfactory and conclusive reasoning. (1 Kernan R. 446, 447.)

¹ *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278, is not followed.

² *Hunt v. Higman*, 70 Iowa, 406 ; *Ferrier v. Storer*, 63 Iowa, 484 ; *Bryant v. Boozee*, 55 Ga. 438 ; *Washburn v. Fletcher*, 42 Wis. 152 ; *Greer v. Chartiers R. R. Co.*, 96 Pa. St. 391 ; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431. The rule stated in the text is supported by the cases above cited, subject to the qualification that the offer is standing and the acceptance is made within a reasonable time. The party making the offer has the right to impose the condition that the acceptance shall be received by him within a time limited, or by return mail. *Union Nat. Bank v. Miller*, 106 N. C.

There are certain qualifications of this rule: 1. Where the party sending the offer retracts it by letter or by telegraph by a communication reaching the party addressed before his letter of acceptance has been written and mailed, an acceptance will not create a contract.¹ 2. Where the party receiving the offer does not write and post his letter of acceptance within a reasonable time, no contract will arise.² 3. Delays and miscarriages by mail do not prevent the completion of the contract; the post-office being the agent of both parties.³ The law relating to contracts negotiated by telegraph or by mail is framed to promote the convenience of the business community.

§ 119. There are several ways in which the contract of mandate may be terminated, so far as the right of control over the property is concerned. If the mandator become insane or an habitual drunkard and a guardian or committee be appointed of his person and estate, the right of control must necessarily pass to the guardian or committee.⁴ If a feme sole mandator marry, the title to her goods and chattels passes under the common law to her husband, and with it the right of control over them.⁵ If the mandator become a bankrupt and his estate passes into the hands of an assignee, the right to demand and receive it supersedes the authority under which the goods were delivered.⁶ A valid assignment for the benefit of creditors must have the same effect as an absolute sale. These several transfers operate upon the authority under which the mandatary holds the goods; in some instances they operate to convert the contract of mandate into a simple deposit, arresting

347; *Lewis v. Browning*, 130 Mass. 173; *Maclay v. Harvey*, 90 Ill. 525; *Taylor v. Rennie*, 35 Barb. 272. If not so received there is no contract. *Id.* An offer sent by telegraph invites or authorizes a reply by the same mode of communication. *Trevor v. Wood*, *supra*; *In re Imperial Land Co. of Marseilles*; *Wall's Case*, 5 English R. (Moak.) 686, and cases there cited. If a proposition is made by mail and an acceptance is forwarded by a messenger, the contract will be complete at the time the acceptance is delivered to the messenger to be carried, and not from the time of the delivery of the acceptance to the proposer. *Fox v. Turner*, 1 Ill. App. 153. But the contract does not become complete on the delivery of an acceptance to a third person to deposit in the post-office. *Maclay v. Harvey*, 90 Ill. 525.

¹ *Taylor v. Merchants' Fire Ins. Co.*, 9 How. U. S. 370; *Thompson v. James*, 18 Dunlop, 1; *School Directors v. Trefethren*, 10 Ill. App. 127.

² *Averill v. Hedge*, 12 Conn. 424; *Ferrier v. Storer*, 63 Iowa, 484.

³ *Duncan v. Topham*, 8 C. B. 225; *Vassar v. Camp*, *supra*; *Thompson v. James*, *supra*.

⁴ *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Leonard v. Leonard*, 14 Pick. 283.

⁵ *Udal v. Kenny*, 3 Cowen, 590, 599. It is otherwise under the present law of this State. *Gage v. Dauchy*, 34 N. Y. 293.

⁶ *Matter of Cook*, 2 Story, 376; *Exp. Newhall*, 2 Story, 360; *Merritt v. Forrester*, 4 Taunt. 541; *Parker v. Smith*, 16 East, 382.

the object of the mandate, and leaving the mandatary still bound to keep the property with ordinary care.¹

A seizure of the property under process against the mandator, with notice to him, will operate to dissolve the contract. The mere insolvency of the mandatary, where the owner is willing to rely upon his fidelity, will not terminate the trust.²

As the mandatary acts gratuitously, having no interest in the subject of the bailment as against his principal, the mandator may at any time revoke the mandate. He has a right to recall the trust and resume possession of the property; or he may transfer the property to another, and with it the right of revocation.³ To make the revocation of the trust effectual, notice must be given to the mandatary;⁴ but this may be done by the appointment of another to relieve him of the trust.⁵

¹ *Tracy v. Wood*, 3 Mason, 132.

² *Williams v. East India Co.*, 3 East, 192; *Doorman v. Jenkins*, 3 Adolph. & Ellis, 80.

³ *Hodges v. Hurd*, 47 Ill. 363.

⁴ *Salt v. Field*, 5 Term R. 215.

⁵ *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198.

CHAPTER IV.

GRATUITOUS LOANS.

§ 120. A gratuitous loan of goods for temporary use, to be afterwards returned, creates a bailment; the title does not pass. A loan of articles to be returned in kind, as money, corn, cattle, and other things that may be valued by number, weight, or measure, is a contract of another class; it is a sale. The absolute property is transferred to the borrower; the understanding of the parties is that he shall consume or sell or otherwise appropriate it as his own.¹ As in a loan of money, the intention is that the borrower shall make use of it as his own, and the law therefore treats it as his property. It is the *mutuum* of the civil law; a contract frequently adopted in connection with a lease of lands, to enable the tenant to stock his farm and carry on the business with a complete control over it. The contract was formerly much used in Scotland, and the grain or cattle thus leased under a stipulation that the like property in quantity and quality should be returned at the end of the lease, were called steelbow goods.²

§ 121. A loan of things to be returned in kind resembles a loan for a temporary and gratuitous use only in form; there is no real similitude between the two contracts. But there is often a close resemblance between a bailment for hire and a sale: a delivery of wheat to a miller to

¹ 2 Kent's Comm. 573, 574. In a loan or letting of cattle or sheep for a certain term, at the expiration of which they are to be returned with others, we have a bailment: in a loan of cattle or sheep under a contract giving the party receiving them the option to replace them with so many other cattle or sheep as good, we have a sale. *Hurd v. West*, 7 Cowen, 752; *Otis v. Wood*, 3 Wend. 498. Contracts providing for an exchange of grain for flour (*Smith v. Clark*, 21 Wend. 83); or of logs for lumber (*Pierce v. Schenck*, 3 Hill, 28); are familiar illustrations of the rule, and have been construed as contracts of sale and not of bailment. See also, *Bartlett v. Wheeler*, 44 Barb. 162; *Weir v. Hill*, 2 Lansing, 278; a rather speculative contract; *Carpenter v. Griffin*, 9 Paige Ch. 310. A contract giving the right to consume the property may withhold the title until it is consumed; *Armington v. Houston*, 38 Vt. 448; and there may be different interests or rights of property created in the same goods. *Wood v. Orser*, 25 N. Y. 348.

² *Carpenter v. Griffin*, 9 Paige Ch. 310; see *Ives v. Hartley*, 51 Ill. 520; and *Loneragan v. Stewart*, 55 Ill. 45; and *Inglebright v. Hammond*, 19 Ohio, 337; a loan of money, see *Chiles v. Garrison*, 32 Mo. 475.

be ground and returned in the form of flour, five bushels of wheat for one barrel of flour, is a bailment, where by the contract the miller is to return the flour produced from the wheat delivered; the title does not pass; it is an agreement for work and services. On the other hand, an exchange of wheat for flour, under a contract which leaves the miller at liberty to deliver flour of a given quality, produced from any wheat, is a double sale; the title to the wheat passes on delivery, and so does the title to the flour. The miller agrees to purchase the wheat and sell the flour; he is therefore bound to deliver the flour, though the wheat be destroyed by fire before he is able to grind it.¹ The distinction running through all the authorities is very simple and clear: when the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed. But when there is no obligation to restore the goods delivered, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale.²

§ 122. A loan of commercial paper, bills of exchange, promissory notes, or other securities for the payment of money, often made by one merchant to another for his accommodation, has but a slight resemblance to a loan of goods or chattels for use. If a man make and deliver his note to a friend without any restriction as to the manner in which it is to be used, he authorizes him to negotiate it for any lawful purpose; and

¹ Norton v. Woodruff, 2 N. Y. 153; Chase v. Washburn, 1 Ohio St. 244; Buffum v. Merry, 3 Mason, 478; Ewing v. French, 1 Blackf. 353; South Australian Ins. Co. v. Randall, 6 Moore P. C. (N. S.) 341. Seymour v. Brown, 19 John. 44, is overruled. Hurd v. West, 7 Cow. 752.

² Mallory v. Willis, 4 N. Y. 76; Hurd v. West, 7 Cow. 52; Smith v. Clark, 21 Wend. 83; Bradley v. Mirick, 25 Hun, 272; Marsh v. Richards, 3 Hun, 550; Foster v. Pettibone, 7 N. Y. 433; Buffum v. Merry, 3 Mason, 478; Barker v. Roberts, 3 Greenleaf, 101; Andrews v. Richmond, 34 Hun, 20. In Mallory v. Willis, *supra*, there was some difference of opinion as to the interpretation of the contract. The wheat was delivered to be manufactured into flour, on certain terms, and the question was whether the flour was to be returned, or so much flour. In Foster v. Pettibone, 7 N. Y. 433, a similar question was passed upon, without any dissent upon the rule of law. So in Wadsworth v. Allcot, 6 N. Y. 64. In Ives v. Hartley, *supra*, it was held that a receipt given by a warehouseman in these terms, "Received of H. 134 bushels of wheat left in store, to take market price when he sees fit to sell," imports a sale. Westcott v. Tilton, 1 Duer, 53; King v. Humphrey, 10 Penn. 1 Barr, 217. See Andrews v. Richmond, 34 Hun, 20; Irons v. Kentner, 51 Iowa, 88; Johnston v. Browne, 37 Iowa, 200; Nelson v. Brown, 44 Iowa, 455; Ledyard v. Hibbard, 48 Mich. 421; Dean v. Lambers, 63 Wis. 331. In the most of these cases the receipt given was construed in connection with extrinsic evidence of the circumstances surrounding the individual transaction and the usage known to the parties, and the character of the contract determined from all the evidence.

he must pay the note to the holder when it becomes due.¹ He loans himself into a debt, unless the borrower pays the note as he ought to. If a man make and loan his note to a friend to be used for a special purpose, it is a breach of good faith to use it for any other purpose, and for that reason no party taking the note with knowledge of its misappropriation, can recover on it against the maker. It being a negotiable note, favored as a commercial instrument, a stranger who takes it before it is due honestly for value, is allowed to recover on it notwithstanding the misuse of the paper. In these cases the borrower, the party accommodated, must indemnify the lender; the law implies an engagement on his part to do so.²

§ 123. A loan of goods or chattels for gratuitous use has all the elements of an ordinary contract, except one; the use is a gratuity from the lender. There cannot therefore be a valid executory contract of this kind.³ After a delivery of the property, the loan is treated as a contract, though it must be conceded that in some features it closely resembles a license to occupy and use real estate.⁴ It confers on the borrower a lawful possession, and it invests him with a special or qualified property; it is as truly a contract as that which is created where goods are delivered to be kept or carried without compensation.⁵ It concerns personal property only, and is distinguishable from a mere license.⁶

§ 124. A loan is not to be deemed gratuitous where it is made for the mutual advantage of the lender and borrower; as where the owner of a horse has no present use for him, and lends him to another person to be worked for his keeping; ⁷ or where chattels are loaned to the borrower for a use which must enure directly to the benefit of the lender; ⁸ or where property is delivered to a party, with the option to purchase and pay for it a certain price within a given time. A conditional delivery, with a view to a sale, operates to give the use for the term of the credit agreed upon; but it is not the same thing as a gratuitous loan.⁹

¹ Edwards on Bills and Notes, 316-324.

² Brown v. Taber, 5 Wend. 566; Wheeler v. Guild, 20 Pick. 545; Edwards on Bills and Notes, 374.

³ Crosby v. German, 4 Wis. 373; Shillibeer v. Glyn, 2 Mees. and Wels. 145.

⁴ 3 Kent's Comm. 452. A license is not assignable, and it is revokable. Crocker v. Cowper, 1 Crompt. Mees. & Ros. 418; Morse v. Copeland, 2 Gray, 302; Pierrepont v. Barnard, 6 N. Y. 279.

⁵ McCauley v. Davidson, 10 Minn. 418. "All bailments, with or without compensation to the bailee, are founded on a sufficient consideration."

⁶ Williams v. Jones, 3 H. & C. 256, 602.

⁷ Chamberlain v. Cobb, 32 Iowa, 161.

⁸ Carpenter v. Branch, 13 Vt. 161.

⁹ Bailey v. Colby, 34 N. H. 29; Dunham v. Lee, 24 Vt. 432; Dunlap v. Gleeson, 16 Mich. 158; DeFonclear v. Shottenkirk, 3 John. 170; Harrison v. Marshall, 4 E. D. Smith, 271. See Austin v. Dye, 46 N. Y. 500.

§ 125. The terms of the loan prescribe the use to be made of the property, and the time of that use. Whether expressed or implied, they constitute the conditions of the trust upon which the goods are loaned. That they are treated as conditions, rather than as the mere stipulations of an ordinary contract, is evident from the consequences following a breach of them. If a carriage be borrowed for a special use, or a horse to go a particular journey, and they be used differently, it is a breach of the trust under which they are loaned, and the borrower is liable for any loss or injury to them, even by accident. *E. g.*, if a horse be lent to go to London, and he be driven towards Bath in another direction, the borrower becomes responsible for any casualties that may happen in the journey towards Bath. Driving the horse beyond the place designated is held a conversion of the property, which will support the action of trover.¹

On a loan of a chattel for a given use for a day, a week, or a month, there is an implied understanding that it shall be returned at the time agreed upon; and it has been held that a failure to return it is a conversion of the property.² And though this ruling can scarcely be supported on sound principles,³ it is quite clear that a continued use of the chattel after the time specified ought to be held a conversion; on the ground that such unauthorized use is a wrongful appropriation of the property. A failure to fulfill a promise, express or implied, may be a breach of contract; but the circumstances must be very peculiar, where such a failure could be deemed a conversion. On the other hand, a man who uses another's goods in violation of his instructions, and for his own advantage, commits a tortious act.⁴

§ 126. The parties to the contract of loan, as in other cases, must have a legal capacity to make a contract. This is important to be borne in mind, since it may affect materially the remedy of the lender, for an injury to the chattel loaned, under a contract which cannot be enforced at law.⁵ Thus, the contract of an infant is not void, but voidable at his election. If a horse is lent to him to go a journey, there is an implied promise that he will make use of great care and diligence to protect the animal from injury and return him at the time agreed upon. But if he pleads his infancy, no action can be maintained against him on

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909, per Chief-Justice Holt; *Wheelock v. Wheelright*, 5 Mass. 104. An unauthorized use of the animal is a conversion of him. *Collins v. Bennett*, 46 N. Y. 490.

² *Clapp v. Nelson*, 12 Texas, 370; *Lay's Exr. v. Lawson's Admr.*, 23 Ala. 377.

³ *Ross v. Clark*, 27 Miss. 6 Jones, 549.

⁴ *Woodman v. Hubbard*, 25 N. H. 67; and *Collins v. Bennett*, supra. See also, *Wentworth v. McDuffie*, 48 N. H. 402, 406—a case of over-driving a hired horse.

⁵ *Campbell v. Stakes*, 2 Wend. R. 137.

this implied promise. If he should sell the horse, an action would lie, and his infancy would not protect him;¹ for that is an election on his part to disaffirm the contract. And so if he be guilty of any willful and positive act of injury to the animal, an action of trespass lies against him for the tort;² though he is not answerable on his agreement for injuries resulting through his unskillfulness, or want of knowledge and discretion.³ The law releasing him from the binding force of his contract is based on the presumption that he has not yet acquired those very qualities of knowledge and discretion; and consequently he cannot be held responsible on his promise, express or implied, to exercise care and diligence. He is liable for torts, not on matters arising *ex contractu*.⁴

§ 127. Married women at common law have not a legal capacity to contract; but in respect to matters usually intrusted to her, the wife may act as the agent of her husband; in his absence, the wife is considered to have a general authority over his property, which must be possessed by some one, unless it be expressly shown that he has constituted some other person his agent for that purpose.⁵ If the husband intrusts the wife with money to make deposits in some bank for safe keeping, and she does so, opening an account in her own name, and afterwards withdraws the money, it seems the court will presume she acted with authority.⁶ But the contract is that of the husband, since the wife cannot contract in her own name. A loan to her, unless it be made with the authority of her husband, will not raise the usually implied contract by the borrower, though if it have his assent it will be the same as a loan to him. Her act with his assent binds him; it is his. The common law disabilities of married women having been removed by statute in this State, and the wife having been given full power to contract in her own behalf, much of the ancient lore in regard to the contracts of husband and wife have become obsolete. In respect

¹ Vasse v. Smith, 6 Cranch's Rep. 226.

² Campbell v. Stakes, 2 Wend. 137; Eaton v. Hill, 50 N. H. 235. So if the infant hires a horse to go to a particular place and goes in a different direction, or hires a horse to go a fixed distance and goes beyond it, he is liable in tort. Homer v. Thwing, 3 Pick. 492; Towne v. Wiley, 23 Vt. 353; Wentworth v. McDuffie, 48 N. H. 402; Fish v. Ferris, 5 Duer, 49.

³ Jennings v. Randall, 8 Term R. 335; Green v. Greenbank, 4 Eng. Com. Law Rep. 377; 2 Marsh Rep. 485; Eaton v. Hill, 50 N. H. 235; Campbell v. Stakes, 2 Wend. 137.

⁴ Homer v. Thwing, 3 Pick. 492; Hanks v. Deal, 3 McCord's Rep. 257; Bristow v. Eastman, 1 Esq. Rep. 172; Wallace v. Morss, 5 Hill R. 391; Medbury v. Watrous, 7 Hill R. 110; Moore v. Eastman, 1 Hun, 578; Studwell v. Shapter, 54 N. Y. 249.

⁵ Church v. Sanders, 10 Wend. R. 79.

⁶ Dacy v. The Chemical Bank, 2 Hill, 550; Miller v. Delamater, 12 Wend. 433; Edgerton v. Thomas, 9 N. Y. 40.

to the other disabilities of parties, it is not necessary here to enter further into the subject ; it is sufficient to say, they are similar in all contracts.¹ In general, married women, under the common law, and infants, lunatics, and other persons not *sui juris*, are not capable of contracting, nor can they appoint an agent or attorney to act for them ;² but infants and married women, as we have seen, may act as agents for others.³

A married woman may now take and hold a separate property the same as if she were unmarried ; she may carry on business, and buy and sell and mortgage her goods and chattels,⁴ and she may with equal right borrow and hold chattels to her own use, without subjecting her husband to any liability on account of them.

§ 128. *The Borrower's Interest.* Under a loan for use, the possession and a transient special property are transferred for the time and use agreed upon ; the borrower takes an interest in the things loaned—what the law calls a special or qualified property. He acquires the possession to which the law attaches the right to protect the property by action against a wrong-doer. He has an interest in the custody and safety of the property, because he is answerable for it to the lender ; and this possessory interest will enable him to maintain an action against any third party who wrongfully interferes with the thing loaned.⁵ The borrower is liable over on his contract to the lender ; this is the ground upon which the law gives him his right of action against third parties. His actual liability in a given case does not appear to be necessary ; it need not be shown to enable him to maintain an action ; for there are situations in which he would be entitled to recover, though not himself chargeable with any breach of duty towards the lender.⁶

¹ Story on Bailm. § 229.

² Snyder v. Sponable, 1 Hill's R. 567; Whitmarsh v. Hall, 3 Denio, 375; The People v. Moores, 4 Denio, 518; Dominick v. Michael, 4 Sand. R. 376; Smith v. Oliphant, 2 Sand. R. 306-711; Crippen v. Culver, 13 Barb. S. C. 424.

³ Co. Lit. 52 a; Chastain v. Bowman, 1 Hill's South Car. R. 270; Riley v. Suydam, 4 Barb. R. 222.

⁴ Van Sickle v. Van Sickle, 8 How. Pr. 265; Talman v. Hawkshurst, 4 Duer, 221; Second Nat. Bank v. Miller, 63 N. Y. 639; Jones v. Walker, 63 N. Y. 612; Laws 1892, Chap. 594.

⁵ 2 Black. Comm. 452, 453; Burton v. Hughes, 2 Bing. 173; Hurd v. West, 7 Cowen, 752; Nichols v. Bustard, 2 Crompt. Mees. & Ros. 659; Bliss v. Schaub, 48 Barb. 339; Hendricks v. Decker, 35 Barb. 298; Duncan v. Spear, 11 Wend. 54; Paddock v. Wing, 16 How. Pr. 547; Van Winkle v. The U. S. M. S. Co., 37 Barb. 122; Kissam v. Roberts, 6 Bosw. 154; Chamberlain v. West, 37 Minn. 54.

⁶ Kellogg v. Sweeney, 1 Lansing, 397; S. C. 46 N. Y. 291; Chamberlain v. West, 37 Minn. 54. In Kellogg v. Sweeney, *supra*, the bailee was a guest at an inn and recovered from the innkeeper gold coin deposited with the clerk and subsequently stolen.

§ 129. The possession of the borrower is not that of a mere servant, and it does not exclude that of the owner, who may in most cases maintain an action for the conversion of the goods by a stranger; and a judgment obtained in his favor will be a good bar to a suit brought in favor of the bailee. Either of them may bring the action, because the bailee's possession is that of the owner, and possession under the right of the owner is sufficient against a person having no color of right.¹ When the bailee has no interest or claim to hold the goods, coupled with his possession, the rule of law applies that the general property draws after it the possession; ² so that the owner has the right of immediate possession.

Without doubt the lender, who loans chattels for an indefinite time, retains the constructive possession of them, and is entitled to reduce the goods to actual possession at his pleasure;³ and it seems he has the power by strict right at all times to revoke the loan,⁴ and repossess himself of the property which forms its subject. This right of revocation may in some cases work injustice towards the borrower, where he has borrowed an article for a particular purpose, which remains unaccomplished at the period chosen by the lender to revoke the loan. Under the Roman law and other codes derived from it, the lender was not permitted to terminate the contract otherwise than as contemplated by the parties to it.⁵ But at common law, it appears the borrower, like the bailee under the contracts of mandate and deposit, has no legal interest in the subject of the bailment as against the bailor. The lender, having the general property in the loan, has the right to reduce it to his actual possession whenever he pleases, and is therefore constructively all the while in possession; so that under the old practice he could sustain the action of trespass *de bonis asportatis*.⁶

Story intimates the opinion, that notwithstanding the lender's right to

The hirer of a horse is liable to the owner for injuries to the horse through the negligence of the servants at an inn at which he is stopping. *Hall v. Warner*, 60 Barb. 198. But liability on the part of the bailee to the bailor is not essential to the right of the former to recover the value of the property from a stranger who has converted it or caused its loss through negligence. *Chamberlain v. West*, 37 Minn. 54.

¹ *Falkner v. Brown*, 13 Wend. 63; 2 Saund. 47; *Sutton v. Buck*, 2 Taunt, 309; *Bliss v. Schaub*, 48 Barb. 339, 343.

² *Thorp v. Burling*, 11 John. R. 285; *Hall v. Tuttle*, 2 Wend. 475.

³ *Orser v. Storms*, 9 Cowen R. 687; *Smith v. Miles*, 1 T. R. 480; *Neff v. Thompson*, 8 Barb. 213, 216; *Pulliam v. Burlingame*, 81 Mo. 111.

⁴ 5 Bac. Ab. Tresp. (C.), pl. 9, 16, 17; *Putnam v. Wyley*, 8 John. R. 433; 2 Camp. R. 464; *Story on Bailm.* § 277.

⁵ *Story on Bailm.* § 257.

⁶ *Root v. Chandler*, 10 Wend. R. 110; 7 Term R. 12; 3 Day, 498, 272; *Herring v. Hoppock*, 15 N. Y. 409, 412, 414; *Ash v. Putnam*, 1 Hill, 302, 306.

terminate the contract of loan whenever he pleases, still if he do so unreasonably, while the object of the bailment is but partly accomplished, and actually occasions injury or loss to the borrower by so doing, the latter may have a suit for damages; or may recoup his damages in an action brought against him for retaining the loan under such circumstances.¹ As no authority is cited for this opinion, its weight must depend entirely upon general principles. The owner of a pair of horses lends them to his neighbor to carry a load of provisions to a particular market; can he, on the way, meet him and demand the immediate possession of the team, leaving the borrower to sustain the injury resulting from such an abrupt and unexpected termination of the loan?² It may in this case well be questioned whether the contract of loan for this special purpose, united to the injury resulting to the borrower from its termination before the purpose has been answered, will not justify the borrower in resisting this demand for immediate possession, and be received as an adequate defense.

§ 130. *Lender's Interest in the Loan.* The title to the thing lent, as we have seen, remains in the owner; the use only being transferred to the borrower.³ The earlier writers speak of the borrower as having a special or qualified property in the subject of the loan;⁴ more recently it is asserted that he has no special property in the borrowed chattel.⁵ But this variation of language does not show any variation of principle. The bailee has an interest in the goods bailed, which, in the old action of trover, was frequently spoken of as a special property, in contradistinction from the naked possession held by a mere servant;⁶ the mere servant could not, while the bailee might maintain the action as against strangers and wrong-doers.⁷ Cowen, in speaking of the distinction between general and special property, says: "*Special* property is where a man holds goods by bailment, or has any temporary interest therein,

¹ Story on Bailm. § 258. "The ground of this doctrine, as stated in the Roman law, is, that although it is purely a voluntary act to make the loan, and to prescribe the terms thereof; yet when once it is made, the lender would, by an unreasonable withdrawal of the loan, impose a burden rather than a benefit, and thus violate the implied obligation between the parties." The doctrine laid down by Story has substantially been incorporated into the statutory law of California. See Cal. Civil Code, § 1894.

² Root v. Chandler, 10 Wend. R. 110; Bac. Abr. 374.

³ 2 Kent's Comm. 574.

⁴ Doct. and Stud. D. 2 c. 38; Bac. Abr. 373; 2 Black. Comm. 453.

⁵ 2 Kent's Comm. 574; Story on Bailm. §§ 279, 93-96, 150; Taylor v. Lindsay, 9 East R. 49; Burton v. Hughes, 2 Bing. R. 173.

⁶ Falkner v. Brown, 13 Wend. R. 63.

⁷ 2 Saund. 47; 1 East R. 244; 4 id. 247; Cro. Eliz. 819.

either in his own right and for his own use, or by authority of law for legal purposes.”¹ So, in Bacon’s Abridgment, where a man lends sheep or cattle, the borrower is said to have a qualified property in them, according to the purposes for which the loan was made.²

§ 131. The general property is in the lender during the continuance of the loan; and the borrower, being responsible to his principal for the goods intrusted to him, has an interest in them, by whatever term described, sufficient to enable him to maintain an action for their protection against strangers, who wrongfully interfere with the goods.³ Has he any legal interest in them, as against the owner? Under the Code of Louisiana, the lender cannot take back the thing lent, till after the time agreed on; or, if no agreement is entered into in that respect, not till after it has been employed in the use for which it was borrowed.⁴ This provision is clearly founded in good sense and sound reason. The borrower has a right to rely upon the good faith of the lender; and where he receives a chattel for a specified use, and actually commences to use it in the manner stipulated, it may occasion him a serious injury to have it suddenly withdrawn, when the object of the loan is but half accomplished. Such conduct in the lender is little less than a breach of trust, and a breach of a trust undertaken voluntarily is a good ground for an action.⁵ The lender has promised the use of the chattel to the borrower; but the law demands a consideration to render the promise valid; and that consideration must be either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.⁶ In the case we have supposed, the borrower acts upon the promise of the lender, receives the chattel, commences to use it under the contract of loan, and will be injured by its withdrawal before the purpose of the loan has been fully accomplished. It should seem that here is a valid contract binding upon the lender as well as the borrower, and that the latter does in fact acquire a legal interest in the subject of the loan, a qualified property in it, according to the purpose for which it was borrowed.⁷

§ 132. Story considers it a matter of serious doubt whether the depository, the mandatary, or the borrower has any special property in the sub-

¹ 1 Cowen’s Trea. 320, 3d ed.; Heyl v. Burling, 1 Caines’ R. 14.

² Bac. Abr. 373.

³ Falkner v. Brown, 13 Wend. R. 63; Bliss v. Schaub, 48 Barb. 339, 343; Hays v. Riddle, 1 Sand. 248, 253.

⁴ Code of Louisiana, Art. 2877.

⁵ Coggs v. Barnard, 2 Lord Raym.

⁶ 1 Cowen’s Trea. 58, 3d ed.

⁷ Doct. and Stud. D. 2 c, 38; Bac. Abr. 373; Story on Bailm. § 258.

ject of the trusts respectively committed to them,¹ and he reviews at length the authorities on the question, inclining to the opinion that the general bailee has an interest, well expressed by the phrase, "possessory interest," in the goods bailed, but not a special property. Blackstone, speaking of the various classes of bailment, says:² "In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may, as well as the bailor, maintain an action against such as injure or take away those chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainer, and the general bailee may, all of them, vindicate in their own right, this their possessory interest, against any stranger or third person. For, being responsible to the bailor, if the goods are lost or damaged by his willful default or gross negligence, or if he do not deliver up the chattel on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; and that he may always be ready to answer the call of the bailor." Sir William Jones says: "Every bailee has a temporary qualified property in the things, of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger who may damage or purloin them."³

Chancellor Kent, in speaking of the depositary, says: He has, perhaps, strictly speaking, no property, general or special, in the article deposited; that he has only a naked custody or possession, with a right of action, if his possession be unlawfully disturbed, or the property injured.⁴ Treating of the loan for use, he says: "The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass or trover, against a wrongdoer."⁵ Afterwards he states the doctrine in the prevailing language of the books: "As every bailee is in the lawful possession of the subject of the bailment, and may justly be considered, notwithstanding all the nice criticism to the contrary, as having a special or qualified property in it; and as he is responsible to the bailor in a greater or less degree

¹ Story on Bailm. § 93.

² 2 Black Comm. 453; 13 Rep. 69.

³ Jones on Bailm. 80; Year B. 21; Hen. VII. 14 b, 15 a.

⁴ 2 Kent's Comm. 568.

⁵ Burton v. Hughes, 2 Bing. Rep. 173; Hurd v. West, 7 Cowen R. 752; 2 Kent's Comm. 574; Little v. Fossett, 34 Me. 545; Magee v. Toland, 8 Port. 37.

for the custody of it; he, as well as the bailor, may have an action against a third person for an injury to the thing; and he that begins the action has the preference; and a judgment obtained by one of them is a good bar to the action of the other.”¹

§ 133. Where no time is limited for the continuance of the loan, the lender has undoubtedly title, and a right to repossess himself of the chattels bailed at any time; the borrower having no right whatever over the chattels as against the lender.² The lender has not in such a case the actual, but the constructive possession, which follows the title, and which exists wherever he has the right to reduce the property to actual possession at any time.³ This he cannot have where he has transferred to the bailee by a valid contract a right for a specified term to the use of the goods bailed; because in that case he is not entitled to reduce the goods to his possession when he pleases.⁴

The question whether the borrower under a loan for a definite time or use can have a legal interest as against the lender, is rather speculative, and it does not appear to have been directly passed upon; though in an early case it was assumed in argument that a loan for a definite time gives the borrower an interest in the chattel during that time.⁵ There is here by common consent a contract of loan between the parties, embracing mutual promises, expressed or implied, from the circumstances; and where the borrower takes action upon the faith of the loan, the lender ought not to recall the property until the time or purpose of the loan has been fulfilled, to the injury of the borrower.⁶ On the other hand, a loan made without any specification as to time or purpose, is but a bare license or authority which may be recalled at any time.⁷

¹ *Flewelling v. Rave*, 1 Bulst. Rep. 68; *Booth v. Wilson*, 1 Barnw. and Ald. 59; 2 Kent's Comm. 585. In a somewhat recent case the facts were as follows: A brother, owning an oil painting, a family heirloom, loaned it to his sister to be kept by her until called for. A carrier injured it in carriage; and it was held that the sister could not sue for the injury, the right of action being in the brother. *Lockhart v. Western & Atlantic R. R. Co.*, 73 Ga. 472.

² *Orser v. Storms*, 9 Cowen's R. 687; *Pulliam v. Burlingame*, 81 Mo. 111.

³ *Putnam v. Wyley*, 8 John. R. 433.

⁴ *Hoyt v. Gelston*, 13 John. R. 142 and 561; *Aiken v. Buck*, 1 Wend. R. 466.

⁵ *Bringloe v. Morrice*, 1 Mod. R. 210; *Viner's Abr. Bailment D.*; *Bac. Abr. Bailment D.*; *Cro. Jac.* 687; 2 Roll. R. 440; 1 Strange, 165; *Taylor v. Lindsay*, 9 East, 49.

⁶ *McGehee v. Mahone*, 1 Ala. Select Cases, 212; *Code of Louisiana*, Art. 2877, 2878.

⁷ *Sheppard's Epitome*, Countermand.

Root v. Chandler, 10 Wend. 110. In *Root v. Chandler*, it was held that the lender has a constructive possession of the thing loaned; but it appeared in that case that the borrower had exceeded his authority in the use of the chattel bailed; the plaintiff lent a pair of horses to Evan Rice and Stephen Goss, to enable them to retail a load of fish. The horses were lent at Buffalo, and the borrowers had permission to proceed

§ 134. The right of countermand exists in respect to a license, permission, trust, agency or authority, in which the agent or bailee acquires no legal interest. If one gives money to another to pay over to a third person in discharge of a debt, the *cestui que use* may recover it in an action of debt or account against the bailee; but if the money were delivered to the bailee to hand to a third person, to whom nothing was due, the owner has a right to countermand the authority at any moment before it is executed.¹ In like manner, a delivery of goods to A, to the use of B, upon a precedent consideration, may not be countermanded, because it vests the absolute property in B; it being for his benefit, his acceptance is presumed even before it be actually manifested.² A person delivering money to another for a charitable purpose may countermand the authority so long as the money remains in the hands of the bailee, unappropriated according to the purposes of the trust.³ Indeed, if the power or authority be in its nature legally revocable, it seems that it cannot be rendered irrevocable by any act or stipulation on the part of him who grants it. So long as it is a mere license or authority, granted as a matter of ease, pleasure or trust for the benefit of the bailor, it may be countermanded.⁴ If the owner of goods deliver them to a bailee to be delivered over to a third person, the bailee has no property in them except for the purpose of trust.⁵ But if the bailment is not on a legal or valuable consideration, the delivery is countermandable; and in that case, if the bailor bring an action in the nature of trover, he reduces the property again in himself, for the action amounts to a countermand of the gift; but if the delivery be on a valuable or legal consideration, the bailor cannot maintain his action because he has not the right of immediate possession; he has, for the time being, parted with an interest in it.⁶

east as far as Clarence, in the county of Erie; but one of them went as far as Batavia, in the county of Genesee, where the horses were seized by the defendant's direction on an execution against Rice. The action was trespass *de bonis asportatis*, and on the trial a verdict was rendered for plaintiff. One of the questions raised on a motion for a new trial was, whether the plaintiff had a sufficient possession to maintain trespass; and upon this question the court say: "The plaintiff had the general property in the horses; he lent them to Rice to go to Clarence, but no farther; he had a right to reduce the property to his actual possession whenever he pleased; he was therefore constructively in possession, and the action on that ground is well sustained."

¹ Peter Harris v. Peter de Bervoir, Cro. Jac. 687.

² Atkin v. Berwick, 1 Strange, 165.

³ Taylor v. Linday, 9 East, 49.

⁴ Sheppard's Epitome, Countermand.

⁵ Roll. Abr. 606.

⁶ Bulst. 68; 2 Leon, 30; Yelv. 104. Many of the earlier adjudications on the subject of bailments were made in the old action of detinue, in which it was held a good plea,

§ 135. *Degree of Care and Diligence.* Under a gratuitous loan for use, the benefit being all on one side, the borrower is bound to use extraordinary diligence in preserving the borrowed chattels : he is bound to exercise all the care and diligence which the most careful and vigilant men employ in their own affairs ; and he is responsible for even slight negligence, whereby the property is lost or injured. The omission of the most exact and scrupulous caution, or any want of prudence, is regarded as a culpable neglect in the borrower.¹

that the bailment was upon a condition. *Viner Abr. D. Rich v. Aldred* was an action in detinue for the recovery of a picture of Oliver Cromwell, and Chief-Justice HOLT, at the trial, illustrated the doctrine thus : If A bail the goods of C to B, and C bring detinue against B for them, B may plead the bailment to him by A to be redelivered to A, and so bring in A as garnishee to interplead with C; and if A bail goods to C and afterwards give his whole right in them to B, B cannot maintain detinue for them against C, because the special property that C acquires by the bailment is not thereby transferred to B. 6 Mod. R. 216.

¹ *Scranton v. Baxter*, 4 Sand. R. 5; cited in *Moore v. Westervelt*, 27 N. Y. 234, 243; *Howard v. Babcock*, 21 Ill. 259; *Bennett v. O'Brien*, 37 Ill. 250; *Ross v. Clark*, 27 Mo. (6 Jones) 549; *Green v. Hollingsworth*, 5 Dana (Ky.), 173; *Fortune v. Harris*, 6 Jones (N. C.), 532; *Wood v. McClure*, 7 Ind. 155; ante, § 5. See Cal. Civil Code, §§ 1886-1889.

Lord Holt, in *Coggs v. Bernard*, states the doctrine on this point thus: The borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable. 2 Ld. Raymd. 909, 916. It is to be noticed that he states the liability of the bailee for hire, in terms quite as strong, holding that he also is bound to the utmost diligence, such as the most diligent father of a family uses. Mr. Justice Blackstone also classes these two kinds of bailment together, and describes them in nearly the same words, but evidently without any intention of stating accurately the degree of care demanded in each. Sir William Jones notices this similarity of language, used in reference to contracts quite dissimilar, and contends that Chief-Justice Holt was misled by Bracton, on whose authority he relied; that the language of Bracton is copied exactly from Justinian; that Justinian states in the proem to his Institutes, that his decisions on that work were extracted principally from the commentaries of Gaius; and that the epithet *diligentissimus*, which comes down through Bracton, is in fact used by that ancient lawyer, and by him alone, on the subject of hiring. Jones on Bailm. 86, 87. Sir William mentions that Gaius is remarked for writing with energy, and for being fond of using superlatives where all other writers are satisfied with positives; certainly if this view, which is very plausible, be correct, it must be admitted that the energetic Gaius has succeeded in prolonging the emphasis of that word through an unusual lapse of time. It is, however, plain that the use of the word *diligens* in the place of *diligentissimus*, in the passage quoted, will alter its entire meaning, so as to make it conform to the doctrine as now settled, which demands of the bailee for hire only the ordinary care which diligent men take of their own goods. Jones on Bailm. 87. But the borrower, who alone receives benefit from the loan, is bound to the use of extraordinary care, such as the most diligent and prudent men use in securing their own goods.

The borrower does not insure the safety of the goods ; and he is not liable for them, where he keeps and uses them with due care, and in the manner permitted by the terms of the loan ;¹ he is not liable where the chattel dies, or is stolen, or is destroyed by fire, without any negligence on his part.² The risk of losses like these abides with the owner, unless the bailee has failed in his duty to anticipate and guard against the danger.

The nature of the property must be considered, as in other cases, in determining the kind of care for which the borrower is answerable. For though the law exacts the same degree of care over all borrowed goods and chattels, it is evident that a different kind of vigilance must be employed in the use of a horse, a watch, a book, or a sleigh. The ordinary mode of using the chattel, the attention required in keeping it, and the dangers to which it is naturally exposed, usually indicate the manner in which it should be guarded and preserved. *E. g.*, in the safe-keeping of a carriage, the borrower must take reasonable care to house it in a safe building ;³ and in the keeping of a horse he will be justified in stabling or turning him out to pasture ; according to the custom of the place ; and he will not be held liable for an injury to the horse, arising from a fall on a hillside or sloping field, used as a common pasture.⁴

§ 136. The borrower of a horse may not be liable for the want of reasonable intelligence and skill ; and it has been asserted that the lender who knows perfectly his inexperience and incapacity must be content with that degree of care and skill actually possessed by the borrower. And it is clear that a man who lends a horse to a minor cannot recover against him in an action grounded on the contract ; nor in an action of tort, without showing some positive or tortious misuse or misappropriation of the property.⁵ With this exception the borrower of a horse is certainly bound for the exercise of reasonable care and skill in

¹ *Camoy's v. Scurr*, 9 Carr & Payne, 383. See *Hard v. Neaving*, 44 Barb. 472, 488; *S. C.* reversed on other grounds, 35 N. Y. 302; *Beller v. Schultz*, 44 Mich. 529.

² *Wood v. McClure*, 7 Ind. 155; *Millon v. Salisbury*, a case of hiring, 13 John. R. 211; *Hyland v. Paul*, 33 Barb. 241, 245; *Chitty on Contracts*, ed. of 1851, p. 630, note. A borrower of a horse under an agreement to return it in good condition, or if by reason of accident or otherwise he should fail to do so, to pay its value, is not liable for such value on the death of the horse while in his possession, in the absence of any evidence tending to show negligence or fault on his part. *Whitehead v. Vanderbilt*, 10 Daly, 214. But see *Harvey v. Murray*, 136 Mass. 377.

³ *Searle v. Laverick*, 22 W. R. 367; L. R. 9 Q. B. 122; a case of hire, justifying the statement in the text. See also, *Moulton v. Phillips*, 10 R. I. 218; *S. C.* 14 Am. R. 663.

⁴ *Fortune v. Harris*, 6 Jones Law (N. C.), 532.

⁵ *Ante*, § 50.

driving and feeding and watering him. He is without any question bound for the exercise of as much intelligence and discretion as a bailee for hire.¹

We have seen that a depositary or mandatary may be held liable for a loss of money entrusted to him, though he take the same care of it as he does of his own, where it is shown to have been lost through his gross negligence.² To lessen the borrower's responsibility below the rule fixed by law, it would be necessary, it should seem, to show a state of facts from which it might reasonably be left to the jury to find a special contract to that effect. The loan is usually an act of friendship, and the lender knows both the borrower's character and how the thing loaned is to be used; and where a man lends a horse to a friend, whose mode of driving he is well acquainted with, to be harnessed with another and driven to a place named within a given time, it may fairly be presumed as matter of fact that the lender agreed to assume the risks attending the use contemplated.³

§ 137. The civil law, which is quoted to show that the character of the borrower, being known to the lender as that of a careless or rash man, will lessen his liability, makes distinctions not recognized under the common law.⁴ Thus the Code of Louisiana lays it down as the general principle, that the depositary is bound to use the same diligence in preserving the deposit as he uses in preserving his own property;⁵ and then provides that the principle shall be enforced rigorously where the deposit has been made at the depositary's request, where he is to have a reward, where it is solely for his advantage, or where it has been agreed that he should be answerable for all neglects. The same principle is here applied to the depositary in all cases, only in some it is enforced with greater rigor; it being left to the discretion of the court to determine when the circumstances of the case dispense with or demand severity in its application.

¹ *Mooers v. Larry*, 15 Gray (Mass.), 451; *Eastman v. Sanborn*, 3 Allen (Mass.), 594. Under the California Code, one who borrows a living animal for use must treat it with great kindness and provide everything necessary and suitable for it. Cal. Civil Code, § 1887. And a borrower for use is bound to have and to exercise such skill in the care of the thing lent as he causes the lender to believe him to possess. *Id.* § 1838.

² *Tracy v. Wood*, 3 Mason, 132; 2 Kent's Comm. 562.

³ The court would hardly raise such a presumption as a matter of law. *Conway Bank v. Amer. Ex. Co.*, 8 Allen, 512; *Eastman v. Patterson*, 38 Vt. 146; but see *Knowles v. A. & St. L. R. R. Co.*, 38 Maine, 55.

⁴ Kent's Comm. 574; *Jones on Bailm.* 46-65. See Cal. Civil Code, § 1888.

⁵ Code of Louisiana, Art. 2908 and 2909. The edition quoted in these notes is that of 1838, with annotations by Wheelock S. Upton, LL. B., and Needler R. Jennings.

The spirit of the common law is very different; under it the jury make the application of the principles, announced by the court, to the facts established on the trial; and the principles of law are not said to be enforced leniently or rigorously according to circumstances.¹ The facts proven may bring the case under one or another principle of law, but we do not speak of the court as growing lenient or rigorous in its enforcement, nor of the principle as capable of adjusting itself to a sliding scale of care or neglect.

§ 137*a*. Where goods are lent for a use in which the lender has a common interest with the borrower, as in other bailments reciprocally advantageous, the bailee is responsible for only ordinary negligence, and is liable for their return in the same manner as a bailee for hire; for this is not properly a loan.² Consistently with this principle, it must be decided that where goods are lent for the sole advantage of the lender the obligations and duty of the borrower must be modified and reduced to the standard of those exacted of a depositary without reward. So it is not the case of a loan, where a person rides a horse gratuitously at the owner's request, for the purpose of showing him for sale; and the rider being skilled in the management of horses, is bound to use such skill as he actually possesses.³

§ 138. *The Loan, how used.* The loan must be used strictly for the purpose and in the manner contemplated by the parties. Many examples are put by way of illustration. If Wendell lend his jewels to Charles, to be worn by him at a masked ball on a certain evening, the use must be confined to that particular occasion; and if on the way to and from the place where the ball is held, the borrower be robbed of them at the usual time of going and returning, he will not be answerable for their value; but if he go from the ball to a gaming house with the jewels, he will be responsible if he lose them there by any casualty whatever. Lord Holt puts a case to the same effect: If a man lends another a horse to go westward, or for a month, and the bailee goes northward, or keep the horse above a month, the bailee will be chargeable, if any accident happens on the northern journey, or after the expiration of the month, because he has made use of the horse contrary to the trust he was lent to him under, and it may be that if the horse had been used no otherwise than he was lent, the accident would not have befallen him.⁴

¹ Jones on Bailm. 118, 119, 120.

² Carpenter v. Branch, 13 Vt. 161; Jones on Bailm. 72, 73.

³ Wilson v. Brett, 11 Mees. & Welsby, 113.

⁴ Coggs v. Bernard, 2 Ld. Raym. 909; Jones on Bailm. 69; Buchanan v. Smith, 10 Hun, 474. This rule of liability is always enforced where a chattel is hired for use.

The understanding on which the loan is made limits the right to use the property; so that any other use of the chattel, in excess of the privilege or license granted to the bailee, is tortious and wrongful. If a man borrow a horse for his own use, he has no right to permit his servant to ride him; the loan being in this case a strictly personal favor.¹ If the loan be made in general terms, without either express or implied limitation as to the manner of using the horse, the borrower may allow his servant or any competent person to drive or use him, for his accommodation;² but would not be at liberty to loan or let the animal to another party.³ And where, under the terms of the loan, the bailee is free to use or drive the horse by his agent or servant, he is responsible for the same degree of care as if he handled or drove the horse himself.⁴

§ 139. If a man borrow a horse and cutter, or a horse and wagon having a seat for two, he may take in a friend to ride with him, unless there be something to prevent it in the terms of the loan; because an implied understanding has the same effect upon the rights of the parties as an authority given in express words.⁵ Both parties are bound by the agreement; if a horse be lent to go to a particular place, and the bailee go beyond or go to other places in a different direction, this is a secret and fallacious use of the property, which amounts to a conversion of it;⁶ it is said to render him liable for all accidents and injuries befalling the chattel during such unauthorized use; in strict law such use is itself a conversion.⁷

Notes and bills of exchange are frequently made and indorsed merely for the accommodation of a friend, as a substitute for a loan of money; and where they are made or indorsed for a special purpose, they must be used in accordance with the understanding of the parties. The ac-

See *Fox v. Young*, 22 Mo. App. 386; *Malone v. Robinson*, 77 Ga. 719; *Collins v. Bennett*, 46 N. Y. 490. The borrower of a thing for use may use it for such purposes only as the lender might reasonably anticipate at the time of the lending. Cal. Civil Code, § 1890.

¹ *Bringloe v. Morrice*, 1 Mod. R. 210; 2 Kent's Comm. 574.

² *Camroys v. Scurr*, 9 Carr. & P. (38 Eng. C. L. Rep.) 383.

³ *Wilcox v. Hogan*, 5 Ind. 546; *Sargent v. Blunt*, 16 John. R. 74, 76.

⁴ *Hall v. Warner*, 60 Barb. 198; *Scranton v. Baxter*, 4 Sand. 9. As to the care required of a hired driver, see *Newton v. Pope*, 1 Cowen, 109.

⁵ *Harrington v. Snyder*, 3 Barb. 380, 384. See *Ray v. Tubbs*, 50 Vt. 688.

⁶ *Bac. Abr.* 374; *Roll. Rep.* 128. This is undoubtedly the rule where there is a contract of hiring. *Fish v. Ferris*, 5 Duer, 49; *Lucas v. Trumball*, 15 Gray, 306; *Disbrow v. Ten Broeck*, 4 E. D. Smith, 397; *Freeman v. Boland*, 14 R. I. 39. If a person borrows a carriage to go to a particular place and sends it heavily loaded to another place, he is guilty of a conversion. *Hart v. Skinner*, 16 Vt. 138.

⁷ *Fish v. Ferris*, 5 Duer, 49; *Sargent v. Blunt*, 16 John. R. 74.

commodation maker or indorser, in effect, loans his credit and liability to the person for whose benefit he makes or indorses the note or bill of exchange;¹ but if the note or bill, being negotiable, is transferred to a *bona fide* holder for value, the maker or indorser will be liable, notwithstanding the violation of the trust under which the note or bill was made or indorsed. As between the parties to the transaction, however, the loan is governed by the same general principles as regulate the loan of chattels.

§ 140. The contract of loan cannot be violated with impunity; the bailee for hire is confined to the use for which he stipulates; and there is still greater reason for restraining the borrower within the limits of the authority conferred upon him.² When the loan is made in general terms, the lent chattel must be used only in the manner for which it is fitted by its nature;³ if a riding horse be loaned for an afternoon, the fair presumption is that the borrower will use him under the saddle. In former times the loan of a slave, made in general terms, implied an authority to use him as a servant, to go on errands; and the borrower was not held liable for him when he forgot to return.⁴

A loan for a certain time, as where a horse is loaned for a week or a month, or indefinitely, for his keeping, gives the borrower considerable discretion; it will authorize a general use of the animal, by himself or his servant;⁵ but when no time is specified, the loan of a chattel of this nature is regarded as a personal trust reposed in the borrower, and not transferable; certainly it must be so regarded, unless the terms or circumstances of the loan be such as to authorize a greater freedom in the use of the chattel.⁶

§ 141. The character of the loan is a matter of fact. *Prima facie* the lender is understood to loan the chattels for the personal benefit of the borrower in whom he reposes a special trust; it is a contract in which the borrower engages to bestow his personal care and diligence in the preservation of the thing loaned; especially where the chattel naturally requires skillful treatment.⁷ Of course the understanding of

¹ Cowen's Trea. 200, 201, 3d ed.

² *Disbrow v. Ten Broeck*, 4 E. D. Smith, 497; *Scranton v. Baxter*, supra, and *Harrington v. Snyder*, supra.

³ Code Louisiana, Art. 2869.

⁴ *De Foncleur v. Shottenkirk*, 3 John. R. 169.

⁵ *Chamberlain v. Cobb*, 32 Iowa, 161; *Camroys v. Scurr*, 9 Carr. & P. 383.

⁶ *Bringloe v. Morrice*, 1 Mod. R. 210; S. C. 3 Salk. 271.

⁷ *Bringloe v. Morrice* was an action of trespass for immoderately riding plaintiff's mare; the defendant pleaded that the mare was lent to him, and that by virtue of the implied license, he and his servant had alternately rode her. To this plea there was a demurrer by the plaintiff; and the court held that the license for the use of the

the parties will control the implied contract; and this understanding is to be ascertained from all that was said and done at the time the loan was made, the same as in proving a verbal contract of hiring or sale.¹ If the object of the loan be named, the implication is that the borrower will not depart from it or go beyond the reasonable scope of his authority.

§ 142. *Expenses of the Loan.* Under the Code of Louisiana, the borrower bears the expenses incident to the use of the thing loaned; but where he is obliged, for the preservation of the property, to go to some extraordinary expense, necessary and so urgent that he cannot give the lender notice of the same, he is entitled to be reimbursed; the lender must bear expenses of this kind.²

The common law is not different; the borrower must bear the ordinary expenses incident to the use of the loan, or necessary to its due preservation. No reasonable doubt can arise upon this point. The borrower of chattels, whether cattle or slaves, takes upon himself the burden of keeping and taking care of them; since this is necessary to the use of the loan.³ And though this expense, paid by the borrower, does save the owner the cost of keeping, and is so far an advantage to him, the loan is nevertheless regarded as a gratuitous bailment. The incidental advantage is not the compensation necessary to convert the bailment into one of hire.⁴

Where extraordinary expenses, such as could not be anticipated by the parties, become necessary for the preservation of the property, the lender is answerable for them; in an emergency which brooks no delay, the bailee, having no opportunity to communicate with the lender, may incur the necessary and reasonable expenses to preserve the property,

chattel was annexed to the person of the defendant, and could not be communicated to another; for this riding was a matter of pleasure. Chief-Justice North took a difference where a certain time is limited for the loan of the horse, and where it was not. In the first case the party to whom the horse is lent has an interest in the horse during that time, and in that case his servant may ride, but in the other case he may not. He also took a difference between hiring and borrowing a horse to go to York; in the first, the party may permit his servant to ride, or use the animal, not in the second. Mod. R. 210; S. C. 3 Salk. 271.

¹ *Pierson v. Hoag*, 47 Barb. 244. "The law regardeth the intent of the parties, and will imply their words thereunto."

² Code of Louisiana, Art. 2875, 2879. The California Code is to the same effect. Cal. Civil Code, § 1892.

³ The hirer bears the ordinary expense of keeping a chattel. *Harrington v. Snyder*, 3 Barb. 380.

⁴ *Bennett v. O'Brien*, 37 Ill. 250. A different rule in regard to the nature of the bailment was held in Iowa, where the owner of a horse having no use for him, loaned him for his keep. *Chamberlain v. Cobb*, 32 Iowa, 161.

on the credit of the lender. If a horse, the subject of the bailment, suddenly fall sick or is injured, the bailee, bound to take the greatest care of the property, may retain a farrier on the owner's credit, or leave the animal at a hotel for proper care and treatment.¹ His situation is analogous to that of the master of a ship disabled in a foreign port, unable to communicate with his principals and bound to do what he can promptly to protect the interests entrusted to his care.² His rightful power must be as broad as his legal duty: he may therefore, it seems, bind the owner for all necessary and reasonable expenses in the preservation of the property beyond those arising in its ordinary use. In the emergency, he may act for the owner and do what is necessary to be done promptly, on behalf of the owner.

§ 143. *Fraud in Procuring the Loan.* Any misrepresentation, or suppression of the truth which ought to be told, is fraudulent; and fraud vitiates all contracts. The title does not pass under a sale procured by fraud;³ and though there be a delivery, the possession of the true owner is not divested; the fraudulent purchaser is liable in an action of trespass or replevin for an unlawful taking of the goods.⁴ The defrauded seller may bring an action to recover the goods.⁵

Any kind of fraud practiced on the part of the borrower, in order to procure the loan, either by a suppression of the truth or by express falsehood, will avoid the contract and render him liable for all casualties. Asking a favor on the ground of friendship, he is not at liberty to conceal facts that might have a tendency to prevent the loan.

§ 144. One who obtains the loan of a chattel by a fraudulent misrepresentation stands in no better relation towards the lender than a trespasser.⁶ There is here no legal delivery, and no consent to the taking; because consent, in law, is more than a mere formal act of the mind, and must be unclouded by fraud. On a sale procured through fraud

¹ The principle stated in the text is affirmed in *Harter v. Blanchard*, 64 Barb. 617.

² In an emergency rendering the act necessary, the master may hypothecate or sell the ship or the cargo at an intermediate port; the necessity enlarges his power. *Butler v. Murray*, 30 N. Y. 88; *Chambers v. Grantzon*, 7 Bosw. 414; *Nelson v. Belmont*, 21 N. Y. 36; *Merritt v. Walsh*, 32 N. Y. 685.

³ *Root v. French*, 13 Wend. 570.

⁴ *Cary v. Houtaling*, 1 Hill, 311; *Goulding v. Davidson*, 26 N. Y. 604, 606; *Ash v. Putnam*, 1 Hill, 302.

⁵ *Nichols v. Michael*, 23 N. Y. 264. It has been held repeatedly that a sale to an honest purchaser for value will put the property beyond the reach of the first seller. *Paddon v. Taylor*, 44 N. Y. 371; *Simpson v. Del Hoyo*, 94 N. Y. 189. But would this result follow if the fraud of the first purchaser was such as to render him liable to conviction for grand larceny under § 528 of the Penal Code? See *People v. Lyon*, 99 N. Y. 210, 224.

⁶ *Campbell v. Stakes*, 2 Wend. R. 137; *Cary v. Houtaling*, supra.

and false pretenses, the party obtaining the property could not be convicted of larceny in this State prior to the adoption of the Penal Code in 1881;¹ but a bailee might be so convicted who acquired the property fraudulently with a felonious intent to deprive the owner of it. In both cases it was conceded that there was the moral guilt of larceny, but it was not regarded as the same crime under the adjudications.² The Penal Code has swept away many of the finely drawn distinctions that formerly were recognized with reluctance by the courts in the administration of justice, and has embraced in the term "larceny" many distinct offenses at common law and under the Revised Statutes which involved the same moral guilt in their commission, including embezzlement, obtaining property by false pretenses and felonious breach of trust.³

§ 145. Before the adoption of the Penal Code in this State it was held that in order to constitute the crime of larceny, the taking must be with intent to steal, and must be equivalent to an act of trespass;⁴

¹ *Ross v. People*, 5 Hill, R. 294; *Bassett v. Spofford*, 45 N. Y. 387; *Zink v. People*, 77 N. Y. 114; *Thorne v. Turk*, 94 N. Y. 90; *People v. Morse*, 99 N. Y. 602. As to the effect of a delivery procured by fraud on the civil rights of a bailee, see *Bigelow v. Heaton*, 6 Hill, 43.

² *People v. Andersop*, 14 John. R. 295; *People v. McGarren*, 17 Wend. 460. A person who intentionally appropriates to his own use property held by him as bailee is guilty of larceny. *Matter of McFarland*, 59 Hun, 304; Penal Code, § 528.

³ *People v. Dumar*, 106 N. Y. 502; Penal Code, § 528. "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either—

"1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any other person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

"2. Having in his possession, custody or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement or by competent authority, to hold or take such possession, custody or control, any money, property, evidence of debt or contract, articles of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof;

"Steals such property, and is guilty of larceny." Penal Code, § 528.

"A purchase of property by means of a false pretense is not criminal where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged." Penal Code, § 544.

⁴ *The People v. McDonald*, 43 N. Y. 61; *Commonwealth v. King*, 9 Cush. 284; *Thom v. Turk*, 94 N. Y. 90. How far the Penal Code has rendered obsolete prior decisions cannot safely be stated. The authorities cited in support of the remaining propositions of this section are in harmony with the existing law.

but the taking need not be from the actual custody of the owner. A servant entrusted with his master's horse may be convicted of larceny, where he takes the animal from the stable with intent to steal and run away with it.¹ So may the man who hires or borrows a horse on pretense of taking a journey, but in truth with intent to steal him;² and so may the carrier who severs part of the goods from the rest with a felonious intent to appropriate them as his own.³ The taking and conversion of the property, with a felonious intent, by a party having the custody or possession of it for a special purpose, is larceny;⁴ and it is adjudged a felony for a man, eloping with another's wife, to take her husband's goods with her, on her request.⁵

§ 146. The lender is bound to deal fairly with the borrower; but he is not liable for damages arising from the defective state or nature of the things loaned, unless it is shown that he was aware of the defect.⁶ If a man lend a vicious animal of the domestic kind, with knowledge of its viciousness, he is liable for the injuries committed by the animal;⁷ on the ground of his duty to guard and keep the vicious beast with uncommon care, to prevent its doing an injury to any person. It follows that a man may lend a vicious or defective chattel, without incurring any liability, provided he notifies the borrower of its vice or defect, so as to enable him to use and keep it with proper care.⁸

§ 147. *The Borrower, when exempt from Liability.* It results from the rule of liability, we have stated, that in the case of chattels loaned, the owner must abide the loss, if they perish through any accident which a very careful and vigilant man could not have avoided. If they

¹ *People v. Wood*, 2 Park. Cr. 22.

² *Brannan's Case*, 1 City H. Rec. 50; *Commonwealth v. James*, 1 Pick. 375.

³ *Nichols v. The People*, 17 N. Y. 114.

⁴ *Bassett v. Spofford*, 45 N. Y. 387. Under section 528 of the Penal Code a person who intentionally appropriates to his own use property held by him as bailee is guilty of larceny. *Matter of McFarland*, 59 Hun, 304.

⁵ *People v. Schuyler*, 6 Cowen, 572.

⁶ *MacCarthy v. Young*, 6 Hurl. and Nor. Ex. 329; *Blackmore v. The Bristol & R. Co.*, 8 Ellis & Black, 1035, 1050.

⁷ *Campbell v. Page*, 67 Barb. 113; *Kissam v. Jones*, 56 Hun, 432. These cases hold one who lets a vicious horse liable for damages sustained by the hirer in consequence of want of notice of the vicious propensities of the animal. The liability of the lender does not arise out of the loan; it stands on general principles. *Van Leuven v. Lyke*, 1 N. Y. 515; *Osincup v. Nichols*, 49 Barb. 145; *Dickson v. McCoy*, 39 N. Y. 400. The California Code provides that the lender of a thing for use must indemnify the borrower for damage caused by defects or vices in it which he knew at the time of lending and concealed from the borrower. Cal. Civil Code, § 1893. As to the owner's duty in keeping wild animals, see *Scribner v. Kelly*, 38 Barb. 14.

⁸ The merit of a watch-dog proves a defect under some circumstances. See *Fairchild v. Bentley*, 30 Barb. 147.

be taken from him by robbery, or stolen out of his possession, notwithstanding his extraordinary care, the borrower is not liable.¹ The law demands no impossibility, and if he uses more than ordinary diligence, he is not chargeable if they be wrested from him by a force which he cannot resist.² His implied contract does not bind him to guaranty the lender against the machinations and crimes of third persons; in the case of a borrowed horse, if he put him in his stable, and he is stolen from thence, the borrower is not answerable for him. But if he or his servant leave the stable door open, and the thieves take the opportunity of that, and steal the horse, he is chargeable; because the neglect gave the thieves the occasion to steal the horse.³

§ 148. The borrower is not liable for losses caused by inevitable accident, or by the act of God; even a common carrier is not liable for such losses. Still it is clear that both the carrier and the borrower are liable for a loss caused in part by superior natural force, and in part by his own negligence, where it appears that the loss might have been prevented by due foresight and care.⁴ He is liable where through his own fault he brings the property under the operation of an act of God;⁵ as where from the want of due diligence he fails to remove it from exposure to such an act.⁶

§ 149. There are many cases of loss by accident, besides those which occur from the act of God, for which the borrower is not responsible. He is not liable for losses caused by a riot, without any neglect on his part; nor for borrowed chattels destroyed by fire, there being no imputation against him of want of care.⁷ An example is put from the civil law, to show that he may be held liable for a loss by fire: if the house of Caius be in flames and he being able to secure one thing only, save an urn of his own in preference to a silver ewer which he borrowed of Titius, he shall make the lender a compensation for this loss; especially if the ewer be the more valuable, and would consequently have been preferred had he been the owner of them both; even if his urn be more precious, he must either leave it and bring away the borrowed vessel, or pay Titius the value of that which is lost; unless the alarm was so sudden and the fire so violent, that no deliberation or selection was practicable, and Caius had time only to snatch up the first utensil that presented itself.

¹ Wood v. McClure, 7 Ind. 155; Field v. Brockett, 56 Maine, 121.

² Abraham v. Nunn, 42 Ala. 51; Yale v. Oliver, 21 La. Ann. R. 454.

³ Per Lord Holt in Coggs v. Bernard, 2 Ld. Raym. 909.

⁴ Colt v. McMechen, 6 John. R. 160.

⁵ Reed v. Spaulding, 30 N. Y. 630; Davis v. Garrett, 6 Bing. 716.

⁶ Bowman v. Teall, 23 Wend. 310; Wing v. N. Y. & Erie R. R. Co., 1 Hilton, 235.

⁷ Hyland v. Paul, 33 Barb. 241, 245.

Kent agrees that if the borrower in this case saves his own goods, and is not able to save the articles borrowed without abandoning his own, he must pay for the loss, because he uses less care of the articles borrowed than of his own. But he raises the question, if the borrower's goods are more valuable than those borrowed, and both cannot be saved, whether he is bound in that case to prefer the less valuable borrowed chattels? And he answers it by citations from Pothier, that he is liable, without expressing any opinion of his own.¹

§ 150. The borrower's liability is to be ascertained in all cases by referring directly to his express or implied contract, to take the utmost care of the goods loaned. Any failure in diligence, or want of the prudence and care demanded by his contract, will render him liable; the principle is plain and general; and its application to the facts, as developed in each particular case, being a matter to be left to the jury, it can hardly be important to determine, whether proof that the borrower has saved his own very valuable goods from loss in preference to those bailed to him of much less value, where he could not save them both, would be held evidence of due care under the contract. There can be, from the nature of the case supposed, no time for deliberation; and it would seem that the bailee should be held excusable for acting on the impulse of the moment, to seize and save the most valuable article first; and that such an act should not be regarded as conclusive evidence of a want of proper care of the less valuable borrowed article. Under the common law, all the circumstances may be proved, and the question is to be passed upon as one of fact.²

§ 151. The borrower is not liable for goods taken from him by an armed force without his fault or complicity; ³ he is not responsible for property destroyed by the public enemy in a time of war, or by an act of piracy committed on the high seas. Robbery and depredations upon the high seas constitute the crime of piracy; an offense against the uni-

¹ 2 Kent's Comm. 575; Code Napoleon, Art. 1882; Story on Bailm. §§ 245 to 251.

² Bland v. Wosnack, 2 Murph. (N. C.) 373. In this case the defendant received money to carry without reward, and placed the same in his pocket-book, in the outside pocket of his surtout or body-coat, and carried his own money in his breast-coat pocket. In his journey from North Carolina towards New York, he lost his pocket-book and his friend's money, and saved his own; and the court left it to the jury to say whether the loss arose from his want of due care. In the case of The Delaware Bank v. John Smith (1 Edm. Sel. Cas. 351), a package of money was handed to the defendant to carry and deliver to one Wheeler, and the defendant alleged that he lost it in crossing a stream, while other packages of money carried by him were not lost, nor even wet; and the action being one of trover, the court left it to the jury to say whether the money had been lost or converted by the defendant. In Anderson v. Foresman, Wright (Ohio), 508, the fact of loss by theft was left to the jury, on all the circumstances.

³ Abraham v. Nunn, 42 Ala. 51; Yale v. Oliver, 21 La. Ann. R. 454.

versal law of society; the pirate being, according to Coke, *hostis humani generis*.¹ In all these instances of loss by irresistible force, in order to excuse the borrower or other bailee, it must be made to appear that he has not been wanting in the prudence and foresight required of him by his contract; it must be shown that he has not, through his negligence and oversight, exposed the property to the peril of the loss for which he seeks to excuse himself. For where his imprudence has induced the train of circumstances producing the loss; as where he has ridden a borrowed horse in the night time over a road infested with robbers, or too near the advanced guard of a hostile army, and the horse has been killed or taken from him, he is responsible; because he has contributed to the result. It forms no excuse for him to say that the force was irresistible, where it is apparent that it might have been avoided by the exercise of proper vigilance.²

§ 152. The borrower for an indefinite period, like a depositary, is liable for all casualties after a legal demand has been made upon him for a restitution of the loan. His refusal to restore on demand constitutes a conversion of the property, and renders him liable for its value.³ As a borrower for an indefinite time, he cannot stand in any better condition, after a demand made, than the depositary without reward; and we have seen that he is liable in all events, and may be recovered against on the ground of the conversion, evidenced by his refusal to restore the goods. But the owner, if he so elect, may pursue the property and demand its restitution, notwithstanding the act of conversion; and this course is to be preferred where there is any doubt as to the pecuniary responsibility of the bailee.⁴ The bailee cannot object to this, because he is precluded from deriving any benefit from his own wrongful act; but a stranger who has purchased the property of the bailee in good faith, may prove acts of ownership by the borrower over the property with the knowledge of the lender;⁵ and where he is induced to purchase by such acts, amounting to, or accompanying an express declaration that the borrower is the owner, the lender is not permitted to assert the contrary; he is estopped after that from asserting even the truth to the injury of the party acting upon his admission.⁶

§ 153. It follows from the nature of the contract, that in a loan for

¹ U. States v. Palmer, 3 Wheat. 610; The Marianna Flora, 11 Wheat. 1.

² Scranton v. Baxter, 4 Sand. 5; Jones on Bailm. 68, 70, 71.

³ Durrell v. Mosher, 8 John. R. 445; Mitchell v. Williams, 4 Hill, 13. The owner may bring an action of assumpsit on the implied contract. Delaware Bank v. John Smith, supra.

⁴ Code of Civil Procedure, §§ 1689-1736. ⁵ McMahon v. Sloan, 12 Penn. St. 229.

⁶ Dezell v. Odell, 3 Hill, 215; Petrie v. Feeter, 21 Wend. 172; Foster v. Newland, 21 Wend. 94; Watson's Exrs. v. McLaren, 19 Wend. 557.

use, the borrower is not liable for the ordinary wear, decay or depreciation of the thing loaned, provided he use it in a discreet and careful manner. If it be made worse by the effects of the use alone for which it was borrowed, and without any fault on the part of the borrower, he is evidently not answerable for the same, since the very object of the loan is its use.¹ But if it be loaned for one purpose, and used for another, he is, as we have seen, liable for losses by any casualty whatever; this is ever the case in a bailment for hire; and the rule is enforced still more strictly as against the borrower.²

§ 154. The civilians were divided in opinion upon the question, whether in the case of a valued loan, or where the goods lent are estimated at a certain price, the borrower must be considered as bound in all events to restore either the things lent or the value of them so fixed; and the Code of Louisiana, based upon the civil law, holds him thus bound.³ Under the common law, the borrower's liability will hardly be affected by the mere fact that a value is placed upon the thing loaned, unless it is done with the understanding that he shall return it or pay for it. Of itself, the placing of a value or price upon the article does not enhance the obligation of the borrower; it merely serves to fix the amount of recovery in case of a loss for which the bailee is responsible.⁴

§ 155. *Evidence, Burden of Proof.* The nature of the action has a material bearing upon the evidence. The pleadings present the issue of fact to be tried: the plaintiff alleges the facts constituting his cause of action, and the defendant interposes either a denial or some new matter constituting a defense; and the general rule is that the burden of proof is on the party making an affirmative allegation.⁵ But under this rule, the substance of the allegation to be tried, rather than the particular form of the pleading, determines where the *onus* lies.⁶

The plaintiff must prove a negative, where his right of action depends upon the truth of his negative averment: if the plaintiff's right to re-

¹ Code of Louisiana, Art. 2873; *Beller v. Schultz*, 44 Mich. 529. The borrower of stock is not liable for its depreciation without his fault. *Parker v. Gaines*, 11 South-western Rep'r (Ark.), 693.

² *Wheelock v. Wheelright*, 5 Mass. 104; *Ross v. Southern Cotton-Oil Co.*, 41 Fed. Rep. 152.

³ Code of La., Art. 2871.

⁴ *Jones on Bailm.* 71; *Story on Bailm.* § 253.

⁵ *Greene v. Waggoner*, 2 Hilton, 297; *Costigan v. Mohawk & Hudson R. R. Co.*, 2 Denio, 609; *Hollister v. Bender*, 1 Hill. 150. If the defendant admits the allegations of the complaint and pleads a justification, the burden is upon him to establish this affirmative defense. As a rule the burden of proof remains where the issue made by the pleadings places it, although the weight of evidence on one side may have a controlling effect unless met by proof of the other party. *Blunt v. Barrett*, 124 N. Y. 117; *Heilman v. Lazarus*, 90 N. Y. 672.

⁶ *Bentley v. Bentley*, 7 Cowen, 701.

cover depends upon the fact that his goods were destroyed by fire through the negligence of the defendant, a bailee, he must show affirmatively that the loss was caused by such negligence or failure in duty.¹ Two reasons are assigned in support of this rule of evidence; first, that he has alleged it, and it is essential to his right to recover: and second, that he has charged the defendant with a breach of duty, involving a negative; and it is one of the first principles of evidence not to presume an omission or breach of duty. A sure test to determine with which party the burden lies, is to consider which is entitled to a verdict without any proof being given on the subject.² The *onus* rests with the party that has the right to open the case.

§ 156. The action against a bailee should be chosen with a knowledge of the material facts; in other words, the plaintiff's suit should be based upon his true cause of action. *E. g.*, the action of trover cannot be maintained against a bailee for goods which have been lost by accident or stolen from him; for though a demand and refusal are *prima facie* evidence of a conversion of goods then in the possession of the bailee, this evidence is overcome or fails to establish the fact of a conversion, as soon as it appears that the goods were not in the defendant's possession at the time of the demand. In a case of this kind, the owner should bring his action on the contract, or a suit in the nature of an action on the case;³ since the bailee may be held liable in the proper form of action, though not responsible in an action of trover.

Proof of a failure to return borrowed chattels within a reasonable time, no time being specified for their return, does not of itself show a conversion of them;⁴ a demand must be proved, and a failure to return after the demand; because a conversion is a tortious act, to be established by affirmative evidence.⁵ A bailee's failure to keep his promise to deliver or to return the goods is a breach of contract; it is not of itself a conversion of them.⁶

¹ *Lamb v. Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271, 278, and cases there cited; *Stewart v. Stone*, 127 N. Y. 500, 506.

² 1 Greenl. Ev. §§ 74, 80; 1 Phillips' Ev. 5th Amer. Ed., with Cowen & Hill's Notes, 810, 824; *Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. 236; *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65.

³ *Hallenbake v. Fish*, 8 Wend. 547; *Packard v. Getman*, 4 Wend. 615; *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492; *Lockwood v. Bull*, 1 Cowen, 322, 328.

⁴ See *Maginn v. Dinsmore*, 70 N. Y. 410, 417.

⁵ *Fox v. Pruden*, 3 Daly, 187; *Ross v. Clark*, 27 Mo. 549; *Gilbert v. Manchester Iron M. Co.*, 11 Wend. 625; *Whitney v. Slauson*, 30 Barb. 276; but see *Duvall v. Mosher*, 8 John. R. 445.

⁶ *Scovill v. Griffith*, 12 N. Y. 509, 518. See *Eldridge v. Adams*, 54 Barb. 417, showing how far the intent of the bailee is material.

§ 157. In the action upon the contract of loan, the lender establishes *prima facie* his right to recover, by proving the loan and the borrower's failure to return the property within the time specified; the burden of proving that the property has been destroyed or lost, and that the loss did not occur through his neglect, rests upon the borrower. This is the rule of both the civil and the common law. It is enough, in the first instance, for the lender to show that the borrower has not returned the borrowed chattels at the end of the time for which they were lent; or if no time was specified, that he has neglected to return them after a demand made; upon this proof the defendant is liable, unless he shows a loss or destruction of the chattels without any fault on his part. He must account for his failure to return them.¹

§ 158. The plaintiff must begin with evidence sufficient to establish *prima facie* his cause of action; and where the gist of the action is the defendant's negligence, he must sustain his complaint by proof.² He may do this in various ways: first, by showing a failure to restore the goods on demand;³ second, by showing that the goods were not returned or delivered according to the contract, or that they were returned or delivered in a different and damaged condition;⁴ third, that they were injured in such a manner as does not happen in the ordinary course of things, without negligence.⁵ In cases like these, the facts being peculiarly within the knowledge of the defendant, it is incumbent upon him to explain why the goods are not restored, or delivered according to the contract; or to show that they were lost or damaged without any fault on his part. For the same reason, when the injury or death of a horse in the hands of the borrower is proved, it devolves upon him to show that he has exercised the care required by the nature of the bailment, or that the injury or loss occurred without any fault or neglect on his part.⁶ Unexplained, the loss raises a presumption of

¹Scranton v. Baxter, 4 Sand. R. 5; Bennett v. O'Brien, 37 Ill. 250; Boies v. Hartford, etc., R. R. Co., 37 Conn. 272; Delaware Bank v. John Smith, 1 Edm. Sel. Cas. 351; Ouderkirk v. Central Nat. Bank, 119 N. Y. 263, 267. The owner may recover in an action on the contract, on proof of a failure to return; but not in an action of trover. Ross v. Clark, 27 Mo. 549. See Clapp v. Nelson, 12 Texas, 370. Plaintiff may recover on the contract, without proving his title. Casey v. Suter, 36 Md. 1.

²Newton v. Pope, 1 Cowen, 109; Schmidt v. Blood, 9 Wend. 268; Ware v. Gay, 11 Pick. 106; Stewart v. Stone, 127 N. Y. 500, 506.

³Schwerin v. McKee, 5 Robt. 404, 419; Arent v. Squire, 1 Daly, 347; Stewart v. Stone, 127 N. Y. 500, 506; Fairfax v. New York Cent., etc., R. R. Co., 67 N. Y. 11.

⁴Smith v. N. Y. C. R. Co., 43 Barb. 225.

⁵Scott v. The London & St. Catharine Dock Co., 3 Hurlstone & Coltman, 596; Collins v. Bennett, 46 N. Y. 490; Russel Manuf. Co. v. New Haven Steamboat Co., 50 N. Y. 121; Arnot v. Branconier, 14 Mo. App. 431.

⁶Bennett v. O'Brien, 37 Ill. 250; Scranton v. Baxter, 4 Sand. 5.

negligence against him; it casts the burden of proof upon him, to explain, as he may, the cause of the loss.¹

§ 159. The rule of liability, as well as the action and the pleadings, is to be considered in determining with which party lies the burden of proof. For example, the common carrier is liable, in the absence of any special contract, for all losses except these arising from two sources; hence where he fails to deliver the goods, he is *prima facie* liable for them; the burden of proof is on him to show a loss coming within the exceptions.² And where in his bill of lading he exempts himself from losses arising from the "dangers of lake navigation," the shipper of the goods makes out a *prima facie* case against him, by proving the contract, the shipment and the arrival of the goods in a damaged or ruined condition; the carrier must then prove that the injury was caused by one of the dangers of the lake navigation; and the plaintiff, to recover, must then show that the injury arose from the carrier's negligence.³

In like manner the *onus probandi* may pass from side to side in the trial of an action against a bailee without hire. *E. g.*, in an action against a depositary receiving goods to keep without reward, the depositor alleges a conversion of the property, and proves that the bailee has refused to redeliver on demand; and then the *onus* of accounting for the default lies with the bailee, the presumption being that he has converted the goods to his own use; he repels this presumption by showing that they have been lost or destroyed.⁴ Where the action is based upon the contract, the bailor establishes his cause of action by showing the bailee's failure to redeliver the property according to the agreement; the *onus* is then cast upon the bailee to show such a loss as will excuse him, namely, a loss without any gross neglect on his part.⁵

§ 160. *Restitution*. In a loan for use, there is always an implied agreement by the borrower, to redeliver the thing loaned as soon as the time

¹ Wood v. McClure, 7 Ind. 155; McDaniels v. Robinson, 26 Vt. 316, 340; N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. U. S. 344, 423; Fortune v. Harris, 6 Jones Law, N. C. 532.

² N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. U. S. 344, 423; Camden & Amboy R. R. v. Baldauf, 16 Penn. St. 67.

³ Western Transportation Co. v. Downer, 11 Wallace, 129; and Clark v. Barnwell, 12 How. U. S. 272.

⁴ Ante, § 156. Strictly speaking, the burden of proof does not shift from side to side on the trial, but remains where the issue made by the pleadings places it, although the weight of the evidence on one side may have a controlling effect unless met by proof of the other party. Heilman v. Lazarus, 90 N. Y. 672; Blunt v. Barrett, 124 N. Y. 114; Stewart v. Stone, 127 N. Y. 500, 506; Clafin v. Meyer, 75 N. Y. 260, 263.

⁵ Graves v. Ticknor, 6 N. H. 537; Beardslee v. Richardson, 11 Wend. 25; 2 Salk. 655; ante, § 157.

has expired for which the loan was made; or, no time being specified, within a reasonable time; or as soon as the purpose of the loan has been accomplished.¹ Every bailee is bound to redeliver the goods bailed according to the terms of his particular contract; and that of the borrower requires that he return the goods to the lender at the time and place contemplated by the parties. The depositary may retain them until a demand is made for them;² and a mandatary is not to be presumed in fault until after he has been called upon for the property;³ but a borrower must return the loan within the time limited, and is liable in action on the contract for a failure to do so.⁴

§ 161. The borrower may return the loan by the hand of an agent or servant; but in doing so, he is bound to employ an agent or servant of approved skill and prudence, and is answerable for the same degree of care and diligence as when he makes the return by his own hand.⁵ His liability covers the custody of the article until it reaches the owner's possession; he is answerable for the negligence of his agent or servant.⁶ He cannot transfer his duty, though he may ordinarily commit the manual service of making the return to his agent. He may not do this, where the nature of the property is such that his custody of it bears the character of a personal trust; a trust not being in its nature transferable by the trustee.⁷

§ 162. It is the borrower's duty to return the goods or chattels to the lender or to his authorized agent; it is not enough for him to return them to the place from which he received them; he must restore them to the lender's custody.⁸ A delivery of them to a person not authorized to receive them is a conversion of the property; and though the misdelivery be made under a mistake of fact, it renders him liable for the goods in an action of trover.⁹ A wrongful intent is not an essential

¹ Wilcox v. Hogan, 5 Ind. 546; Ross v. Clark, 27 Mo. 549; Lay's Exr. v. Lawson's Admr., 23 Ala. R. 377; 2 Kent's Comm. 573-577; Green v. Hollingsworth, 5 Dana (Ky.), 173.

² Brown v. Cook, 9 John. R. 361; Phelps v. Bostwick, 22 Barb. 314; S. C. 22 N. Y. 242.

³ Beardslee v. Richardson, 11 Wend. 25.

⁴ Scranton v. Baxter, 4 Sand. R. 5; Fox v. Pruden, 3 Daly, 187; Clapp v. Nelson, 12 Texas, 370; Cal. Civil Code, § 1895.

⁵ Scranton v. Baxter, *supra*.

⁶ Hall v. Warner, 60 Barb. 198.

⁷ See Colyar v. Taylor, 1 Coldw. Tenn. 372; Skeller v. Kohn, 17 Ill. 170; cases of mandate involving the principle asserted in the text. See also, Diefendorf v. Spraker, 10 N. Y. 246.

⁸ Esmay v. Fanning, 9 Barb. 176; S. C. 5 How. Pr. 228.

⁹ Devereux v. Barclay, 2 Barn. & Ald. 702; Packard v. Getman, 4 Wend. 613; Stephenson v. Kent, 4 Bing. 476; Coykendall v. Eaton, 55 Barb. 188, 193; S. C. 37 How. Pr. 449.

element of the conversion; it is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it.¹ An unauthorized use of the property by a bailee is a conversion of it;² and so is an unauthorized deposit of the property with a third person, when it brings a charge upon the owner; as where a bailee unnecessarily leaves a borrowed chattel at an inn.³

§ 163. It is the borrower's duty to return the property with its natural increase; because in a gratuitous loan of animals, securities or stocks, there is nothing to vary the general rule that the increment, the interest or increase from property, accrues to the owner.⁴

§ 164. The place where the borrowed goods are to be restored in the absence of any express agreement in that respect, will depend upon the circumstances and nature of the contract. The borrower must return them to the lender, ordinarily at the place from which he received them; but the lender may designate the place where they shall be received. The borrower, in fact, contracts to redeliver the goods bailed; and if no place be agreed upon, the bailor may name the place.⁵ The bailee, no place being appointed for the delivery, must seek the lender and learn at what place he will receive them.⁶ This has been expressly adjudged to be the rule of law in respect to contracts for the delivery of specific articles; but the rule is subject to some qualifications, depending upon the circumstances and the nature, value and bulk of the articles to be delivered. Jewelry, for instance, should be returned to the lender in person, or to his authorized agent; while other articles, such as horses or cattle, should be delivered at the place where the collateral circumstances show that the lender intended to receive them.⁷

§ 165. The Code of Louisiana provides that if the contract does not

¹ *Boyce v. Brockway*, 31 N. Y. 490; *Laverty v. Snethen*, 68 N. Y. 522; *Pease v. Smith*, 61 N. Y. 477; *Cobb v. Dows*, 9 Barb. 242; *Everett v. Coffin*, 6 Wend. 603; *Williams v. Merle*, 11 Wend. 30; *Saltus v. Everett*, 20 Wend. 267; *Hoffman v. Cason*, 22 Wend. 285; *Covell v. Hill*, 4 Denio, 323; *Murphy v. Hobbs*, 8 Col. 17; *Gregory v. Fichtner*, 27 Abb. New Cas. 86; *Haddix v. Eastman*, 14 Ill. App. 443.

² *Beach v. Raritan, etc.*, R. R. Co., 37 N. Y. 457. See also, *Vincent v. Conklin*, 1 E. D. Smith, 203; *Gove v. Watson*, 61 N. H. 136.

³ *Seyds v. Hay*, 4 Term R. 260. The innkeeper may hold the property, a horse, for its keep. *Threlfold v. Borwick*, 2 Eng. Rep. 689; *Jones v. Morrill*, 42 Barb. 623; S. C. 31 How. Pr. 639.

⁴ *Orser v. Storms*, 9 Cowen, 687; *Hasbrook v. Vandervoort*, 4 Sand. R. 74; *Booth v. Terrell*, 16 Georgia, 25; *Allen v. Delano*, 55 Maine, 113.

⁵ Co. Litt. 210 b; *Aldrich v. Albee*, 1 Greenleaf R. 120.

⁶ *Bixby v. Whitney*, 5 Greenleaf R. 192; *Esmay v. Fanning*, 9 Barb. 176.

⁷ 2 Kent's Comm. 507; *Chipman on Contracts*, 25, 26, 27; *Story on Bailm.* § 117. See Cal. Civil Code, § 1896.

specify the place where the articles bailed must be restored, that it shall be restored at the place where the bailment was made.¹ Though the place be not named, if it may be inferred from the terms of the contract, or from the circumstances attending it, the delivery must be made at that place. The borrower assumes the obligation to redeliver, which is as imperative upon him as if he had entered into an agreement to pay a fixed amount in specific articles. The party bound to render a service or make a payment by a given day must seek the party to whom the debt or duty is due.² Is the place of performing the contract changed by substituting a commodity for money? The place of performance is sometimes implied from the nature of the articles to be delivered. If a merchant or manufacturer engages to pay on demand in the articles of his trade, and no place is specified in the contract, the store of the merchant, or the workshop, or place of deposit of the fabrics of the manufacturer, is the place where payment must be demanded before an action accrues for the non-performance of the contract;³ because, from the peculiar circumstances and course of business of the promisors, the inference is that the parties intended that the articles should be delivered at the promisors' usual place of making and delivering the articles sold by them. The engagement is that the articles shall be delivered *on demand*, and this seems to imply that the creditor must go to the debtor to make the demand, before the latter can be in default.

But where a note of hand is given, payable at a time fixed, in cattle grain or other portable articles, and no place of payment is designated in the note, the creditor's place of residence is the place of payment; for in this case there is nothing to rebut the usual presumption that the debtor or party bound must seek his creditor and discharge his obligation within the time limited.⁴ In like manner, the borrower is under an obligation to return the borrowed articles to the lender, and if the time and not the place of the return be fixed, he must take them to the lender's residence or place of business; for this obligation to redeliver is in substance a debt or duty due to the lender.

§ 166. There is some diversity in the decisions in regard to the place where a contract for a delivery of specific articles shall be performed; but this diversity arises out of the difference of circumstances attend-

¹ Art. 2925.

² Goodwin v. Holbrook, 4 Wend. R. 377.

³ Chip. on Cont. 28, 9; Buck v. Burk, 18 N. Y. 337; Haskell v. Mathews, 37 Maine, 541; Vance v. Bloomer, 20 Wend. 196.

⁴ Goodwin v. Holbrook, 4 Wend. R. 377; Stoker v. Cogswell, 25 How. Pr. 267, 274; Musselman v. Stoner, 31 Penn. St. 265.

ing the contract.¹ Thus, an agreement made at the residence of the debtor, payable in farm produce at the market price, may be performed at the place where it is made; and there being no time fixed for the payment, it is held that no action will lie until after a demand is made at the farm of the debtor. The want of time in such a contract renders it payable on demand; and the fact that it is payable in farm produce draws after it the inference that the farm is the place of payment.²

It is held in Kentucky, that on contracts for the delivery of property, where no place is expressed, the usual residence of the obligor is the place of performance; and that where the property is to be delivered on request, a special request at the obligor's residence must be averred.³ The action was on a contract for the payment of two hundred dollars, in a negro, upon request, and it was adjudged on demurrer that the plaintiff must aver in his declaration a demand of the chattel at the residence of the vendor, or show circumstances justifying a departure. The law judges the place according to the nature and subject matter of the thing to be performed; presuming, in such a case, that the contract is to be executed at the place where it is made.

§ 167. In construing contracts of this nature, courts endeavor to carry into effect the intention of the parties, which may very often be inferred from the subject and purpose of the contract, as well as from its language. In an action for articles delivered to a bailee to be redelivered when called for, the bailee being absent from the commonwealth, a demand was made of his wife at the place of his residence; and it was held good, on the ground that one who makes a contract to deliver specific articles on demand should be always ready at his dwelling-house or place of business.⁴ This is clearly much more reasonable than to permit a demand to be made upon him personally for them, since he cannot be expected to carry the goods about with him. The reason here is the same as that which requires a due-bill without time or place, given by a merchant for goods, or a mechanic for work, to be demanded of the merchant at his store, or of the mechanic at his shop.⁵

§ 168. There is a perfect analogy between the contract to pay a fixed sum in specific articles and the undertaking of the borrower to redeliver the goods bailed to him. In respect to the time, place and manner of

¹ *Lobdell v. Hopkins*, 5 Cowen R. 516; *Chambers v. Winn*, Prin. Dec. Kentucky, 192; *Wilmouth v. Patton*, 2 Bibb's Kentucky Rep. 280; *Mason v. Briggs*, 16 Mass. R. 453.

² *Smith v. Leavenworth*, 1 Root, 209; *Bach v. Owen*, 5 Term R. 409; *Chandler v. Windship*, 6 Mass. R. 310; *Benners v. Executors of Howard*, Tayl. N. C. 149.

³ *Wilmouth v. Patton*, 2 Bibb R. 280.

⁴ *Mason v. Briggs*, 16 Mass. R. 453; *Franchot v. Leash*, 5 Cow. R. 506.

⁵ *Lobdell v. Hopkins*, 5 Cowen R. 516; *Woodcock v. Bennett*, 1 Cow. R. 711.

delivery, the obligation is the same, unless, indeed, the borrower is bound more strongly to seek the lender and learn his pleasure as to the place where he will receive the borrowed articles. The farmer who has given his note, payable in farm produce, may deliver the produce and pay the note at the place where it is made. But one who contracts to pay a given sum in salt, on or before a day named, must go to the residence of his creditor and make his payment there.¹ So, also, no doubt the borrower, who has promised to return the bailed goods within a fixed time, must bring them to the lender, either at his residence or place of business, depending upon the circumstances and the subject matter of the contract. If he fail to fulfill the promise, he is liable for the value of the property.² The duty he owes to the lender to return the property involves an obligation as strong and imperative as that which the debtor owes to his creditor; he must not wait for a demand unless the loan is made for an indefinite time; and even then, he must make the return at the place designated by the lender. If he retains the goods for a longer time than has been agreed on, and after a demand, he is liable for any loss that may happen;³ because he is liable as for a conversion of the property. And, of course, whenever the bailee has been guilty of a neglect in the return which amounts to an act of conversion, he is liable for all subsequent losses, even by accident.

§ 169. Where several persons jointly borrow an article, they are bound for it *in solido*; ⁴ they enter into a joint contract to take care of and return it, which may be enforced against them all jointly, because each is answerable for the acts of the others. But the action should be brought against them all, or against the survivors, if one or more of them be dead. An agreement entered into by several persons is presumed to be a joint contract, unless otherwise expressed.⁵

§ 170. A general loan for use is deemed strictly precarious; it is held subject to the will of the lender; he grants simply the custody of the chattels lent, with the authority to use them, and by implication retains the right to revoke the authority and reclaim them at any time. The possession in fact remains with the lender, so that under our old practice he might maintain the action of trespass against a third person who had seized the property; which could be maintained only where the plaintiff

¹ Goodwin v. Holbrook, 4 Wend. R. 377; La Farge v. Rickert, 5 Wend. 187, 189.

² Durrell v. Mosher, 8 John. R. 445; Bryant v. Wardell, 2 Exchq. R. 479; Put v. Rowsterne, T. Raym. R. 472; Lashmere v. Toplady, 2 Vent. 170; Lucas v. Trumbull, 15 Gray, 310; Porter v. Foster, 7 Shep. 391; Ripley v. Dolbier, 6 id. 382; Hart v. Skinner, 16 Vt. 138; Spencer v. Pitcher, 8 Leigh, 565.

³ Code of Louisiana, Art. 2870; Jones on Bailm. 68; Coggs v. Bernard, 2 Ld. Raym. 909, 916; Fox v. Pruden, 3 Daly, 187, 190.

⁴ Code of Louisiana, Art. 2876.

⁵ 1 Cowen Trea. 609, 611, 3d ed.

had either the actual or constructive possession of the goods. And he is constructively in possession whenever he has the immediate right to reduce them into his actual possession.¹

The loan being subject to the pleasure of the lender, it may be revoked in several ways; by a demand that it be returned, by the death of the lender, or by a sale of the thing loaned with notice to the bailee. Being given for an indefinite time, the permission to use the property may be withdrawn at will, like the authority of an agent, or like a license to use or occupy lands.²

§ 171. The borrower is not bound to restore, or pay damages for the goods, where they are taken or destroyed by irresistible force, or by the wrongful act of a third person; in other words, he relieves himself from liability by showing such a loss or injury to the property, and that the same occurred without any negligence or want of prudence on his part.³ He must account for his failure to restore the goods, and he can only do so by showing the manner in which they were lost or injured; that is to say, he must answer the case made against him by proof of his failure to return the goods, by showing a loss or injury for which he is not ordinarily responsible.⁴ The form of the issue decides where the burden of proof lies; if the plaintiff alleges an injury by the negligence of the defendant, he must support his allegation by proof,⁵ and it is conceded that slight proof will be sufficient.

§ 172. A loss of the goods by theft will excuse the borrower, when it occurs without any fault on his part. The mere fact of a loss by theft from a room of an inn or while the goods are in the custody of a

¹ Orser v. Storms, 9 Cowen R. 687; Neff v. Thompson, 8 Barb. 213, 216; Van Sickle v. Van Sickle, 8 How. Pr. 265.

² The death of the licensor or his sale and conveyance of the premises revokes his prior license. Eggleston v. N. Y. & H. R. R. Co., 35 Barb. 162. The license is valid until it is revoked. Seldon v. Del. & Hud. Canal Co., 29 N. Y. 634; Pratt v. Ogden, 34 N. Y. 20.

³ Vaughan v. Menlove, 3 Bing. N. C. 468; Scranton v. Baxter, 4 Sand. 5; Cumins v. Wood, 44 Illinois, 416; 37 id. 250; Abraham v. Nunn, 42 Ala. 51; Yale v. Oliver, 21 La. Ann. R. 454. After the bailee has shown that the loss of the goods was occasioned by some accident or misfortune not within his control, such as a fire or a burglary, he is not required to go further and show absence of negligence by giving affirmative proof of the exercise of due care in guarding against a possibility of loss from such causes; but it is for the bailor to show a want of proper care on the part of the bailee in guarding the goods that caused or contributed to their loss. Clafin v. Meyer, 75 N. Y. 260; Stewart v. Stone, 127 N. Y. 500, 506; Mills v. Gilbreth, 47 Me. 320.

⁴ The carrier's failure to deliver casts upon him the burden of accounting for his failure. Burrell v. N. Y. C. R. R. Co., 45 N. Y. 184.

⁵ Watson v. Bauer, 4 Abbott's Pr. N. S. 273; Blunt v. Barrett, 124 N. Y. 117; Clafin v. Meyer, 75 N. Y. 260; Heilman v. Lazarus, 90 N. Y. 672; Heinemann v. Heard, 62 N. Y. 448.

carrier, is considered proof of negligence ;¹ because ordinarily the carrier and always the innkeeper insures against this kind of loss ; the rule establishing his liability being framed with the intention of holding him accountable for losses of this kind ;² and not considered applicable where the carrier's contract leaves him liable simply as a bailee for hire.³ A refusal or failure to give any account of the loss or injury to the goods raises a presumption against the bailee, and proof of that fact is sufficient in the first instance to hold him accountable for the goods.⁴

§ 173. The borrower of a chattel is not permitted to set up title in himself, to justify a violation of his promise to return it ; he is not allowed to dispute the lender's title. The same principle applies as between landlord and tenant, principal and agent, and bailor and bailee.⁵ A sale of the property, where the bailee has no existing legal interest in it as against the bailor, changes the right of possession, and the bailee with notice cannot hold the property after the sale.⁶ The purchaser takes the place of the bailor. Where the bailee fails to return the property and promises to pay for it, the action of *assumpsit* lies against him as in the case of a sale.⁷ And after a special deposit of money for safe keeping, an agreement between the parties to consider it a loan converts the bailment into a debt.⁸

§ 174. Though the borrower cannot acquire title to chattels loaned to him, by any act of which he may be guilty, he is, as we have seen, liable for their value whenever he has exercised acts of ownership over them, and the lender elects to bring his action as for a conversion of the property. The owner does not lose his title without his consent, by any alteration of form through which his property may pass ; he may seize it in its new shape so long as he can prove the identity of the

¹ *Gile v. Libbey*, 36 Barb. 70; *Hulett v. Swift*, 42 Barb. 230; *Merritt v. Claghorn*, 5 Adol. & Ellis, N. S. 164; *Clute v. Wiggins*, 14 John. R. 175; *Gilbert v. Dale*, 5 Adol. & Ellis, 450; *Alden v. Pearson*, 3 Gray, 342; *Clark v. Barnwell*, 12 How. 272; *McDaniels v. Robinson*, 26 Vt. 316, 340.

² *Schieffelin v. Harvey*, 6 John. R. 171, 177; *Watkinson v. Laughton*, 8 John. R. 213; *De Rothschild v. Royal Mail Steam Packet Co.*, 14 Eng. Law and Eq. 327.

³ *Lamb v. Camden & Amboy R. & Tr. Co.*, 46 N. Y. 271, 278.

⁴ *Bush v. Miller*, 13 Barb. 481, 489; *Schwerin v. McKie*, 5 Robt. R. 404, 419; *Logan v. Mathews*, 6 Barr. 417; *Cumins v. Wood*, 44 Ill. 416. See *Bowman v. Eaton*, 24 Barb. 528.

⁵ *Simpson v. Wrenn*, 50 Illinois, 222; *Faltz v. Stevens*, 51 id. 180; *Maxwell v. Houston*, 67 N. C. 305; *Pulliam v. Burlingame*, 81 Mo. 111.

⁶ *Hodges v. Hurd*, 47 Ill. 363; *Britton v. Aymar*, 23 La. Ann. R. 63. It would be otherwise if the contract were one of hiring. *Hardy v. Lemons*, 36 La. Ann. 146.

⁷ *Parker v. Tiffany*, 52 Illinois, 286. Where a man receives depreciated notes and gives a due-bill for them, he is *prima facie* liable for them as a debt. *Rankin v. Craft*, 1 Heiskell R. 711.

⁸ *Chiles v. Garrison*, 32 Mo. 475.

original materials, as leather made into shoes, cloth into coats, trees squared into timber, wood converted into coal, logs manufactured into boards, or black salts converted into pearl-ashes.¹ But if he elects to bring his action of trover against any person who acquires the custody of his goods by bailment or otherwise, and recovers their value in damages, his title will pass to the defendant on payment of the judgment entered for the amount of the recovery.²

§ 175. As gratuitous loans sometimes run on through a number of years, it is important to ascertain the application of the statute of limitations; and here we are to observe that the statute runs from the time when the action accrues. Under a general loan for an indefinite time, it cannot commence to run until after a conversion of the property by the bailee;³ and under a loan which really leaves the goods in the hands of the borrower subject to the lender's call, a demand must be necessary before a right of action will accrue.⁴ With reference to the statute, the lender's right is not unlike that of a customer, who deposits his money in a bank subject to his check or draft; and his right of action does not accrue until after he has drawn for the money in the usual way.⁵ There being no violation of the contract, mere lapse of time will not affect the lender's title or right of property.⁶

¹ *Curtis v. Grant*, 7 John. R. 168; 5 id. 348; *Babcock v. Gill*, 10 John. R. 237; *Brown v. Sax*, 7 Cowen, 95; *Baker v. Wheeler*, 8 Wend. R. 505.

² *Osterhout v. Roberts*, 8 Cowen, 43; *Thurst v. West*, 31 N. Y. 210; *Marsden v. Cornell*, 62 N. Y. 215, 220; *Thayer v. Manley*, 73 N. Y. 305.

³ *Kelsey v. Griswold*, 6 Barb. 436; *Huntington v. Douglas*, 1 Robt. 204; *Bruce v. Tilton*, 25 N. Y. 194; *Roberts v. Bardell*, 61 Barb. 37. See *Roberts v. Sykes*, 30 Barb. 173.

⁴ *Payne v. Gardiner*, 29 N. Y. 146. The old cases should be read in connection with the new provision of the Code of Civil Procedure in relation to the time limited for the commencement of actions where a demand is necessary. This provision is as follows: "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete, except in one of the following cases:

"1. Where the right grows out of the receipt or detention of money or property by an agent, trustee, attorney or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.

"2. Where there was a deposit of money not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned specifically or in kind at a fixed time or upon a fixed contingency, the time must be computed from the demand." Code of Civ. Pro. § 410.

⁵ *Downes v. Phoenix Bank*, 6 Hill, 297.

⁶ In *Booth v. Terrell*, 18 Ga. 570, a gratuitous loan was made for life; and in *Orser v. Storms*, 9 Cowen, 687, the loan ran on for seventeen years. See *Farrow v. Bragg*, 30 Ala. 261; *McCoy v. Odom*, 20 Ala. 502; *Cortelyou v. Lansing*, 2 Caines' Cas. 200.

CHAPTER V.

PLEDGES OR PAWNS—COLLATERAL SECURITIES.

§ 176. We come next in order to consider bailments, mutually beneficial to both the parties to the contract. A pledge is something put in pawn or deposited with another as security for a debt, or for the performance of some agreement; and the contract is confined to personal property.¹

Notes, bonds, stocks, and in general all kinds of personal chattels may be given or delivered in pledge; and the mere delivery of a chattel or chose in action is sufficient.² The title to the thing delivered in pledge does not pass, as it does in the case of a chattel mortgage. The delivery is made as a security for the payment of a debt or for the performance of some other act; and the party making the delivery retains a power of redemption. In a chattel mortgage the title is conveyed, subject to a condition of defeasance in case of payment; while the title to goods deposited in pledge remains in the person making the deposit; only a special property passing to the pledgee. There is also another distinction between a pledge and a mortgage of personal property; a delivery is essential to a pledge, while a mortgage of goods is valid without a delivery.³

¹ *Markham v. Jaudon*, 41 N. Y. 235, 241; *Stearns v. Marsh*, 4 Denio, 227. A pledge is a bailment of goods by a debtor to his creditor to be kept till the debt is discharged. *Jones on Bailm.* 118. The fourth sort of bailments is when goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor; and this is called in Latin *cautum*, and in English a pawn or pledge. *Coggs v. Bernard*, 2 Ld. Raym. 909, 913. Kent calls it a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt is discharged. 2 Kent's Comm. 577, 578. Story, as a bailment of personal property, as security for some debt or engagement. *Story on Bailm.* § 286. It is the *pignori acceptum* of the civil law, a contract by which a debtor gives something to his creditor as a security for his debt. Code Louisiana, Art. 3100. Pledge is a deposit of personal property by way of security for the performance of another act. Cal. Civil Code, § 2986.

² *McLean v. Walker*, 10 John. R. 472; *Campbell v. Parker*, 9 Bosw. 322; *Luckey v. Gannon*, 1 Sweeny, 12.

³ *Cortelyou v. Lansing*, 2 Caines' Cases, 200; an opinion not delivered (*Barrow v. Baxter*, 5 John. R. 258, 260), but cited and approved until it has become the highest

§ 177. Pledging property as a security for the payment of a debt has been practiced from time immemorial, among communities having no common source or chain of history; and therefore nothing can be gained by searching for the origin of the custom in the history of remote nations. Our mortgage, derived from the civil law, accomplishes the same thing, with a variation of remedies; in a general sense, it pledges the property covered by it for the payment of a debt; its name is significant; it was termed a *mortgage*, the French translation of the *vadium mortuum*, or dead pledge, because it carries in itself no means for its redemption derived from the rents and profits of the property, and because on a failure to pay the debt it was in law lost or dead to the mortgagor; and also so called in contrast with the *vivum vadium*, or living pledge, a grant of lands under which the mortgagee took possession of the premises and received and applied the rents and profits upon the debt, until the same was paid; the property thus working out its own redemption.¹

Equity has wrought many changes in the common law; and we are not surprised to find in the recent act of Parliament reorganizing the English courts, a provision that where the rules of equity come in conflict with, they shall prevail over, the strict rules of law; a provision which in express terms continues in force this transforming element in our laws. Among the changes wrought through its agency, that which has passed upon the mortgage on real estate is not the least conspicuous. From a conditional estate, ripening into an absolute estate on the failure of the grantor to pay the sum specified in it on the day named, it has come to be deemed and practically enforced as a security; it does not now create an estate in the land, it merely gives a lien upon the property.²

authority; *West v. Beach*, 3 Cowen, 82; *Romaine v. Van Allen*, 26 N. Y. 309; *Roberts v. Sykes*, 30 Barb. 173; *King v. Van Vleck*, 40 Hun, 70; *Siedenbach v. Riley*, 111 N. Y. 560; *Parshall v. Eggart*, 54 N. Y. 18. A pledge in the legal sense requires delivery to the pledgee. He must have possession of it. *Christian v. Atlantic & N. C. R. R. Co.*, 133 U. S. 233; *Casey v. Cavaroe*, 96 U. S. 467.

¹ Powell on Mortgages, Chap. I., and 2 Black. Comm. 157.

² *Kortright v. Cady*, 21 N. Y. 343; *Kellogg v. Smith*, 26 N. Y. 18, 20. The earlier writers speak of anything given as a security for a debt as a pledge. "A loan," says Glanville, "is sometimes made on the security of a pledge, and the pledge may consist of chattels, lands or rents. Sometimes possession is immediately given of the pledge on receipt of the loan, and sometimes it is not. Sometimes the thing is pledged for a term, and sometimes without. When a chattel is pledged and possession is given, and for a certain term, the creditor is bound to keep the pledge safely, and not to use it to its detriment. If it be agreed that in case the debtor should not redeem the pledge at the end of the term, the pledge shall remain with the creditor as his own property. the agreement must be observed. But if there be no such agreement, there be a

§ 178. In a general sense the owner, by giving a mortgage upon his real estate, pledges it to secure the payment of a debt or the fulfillment of some obligation; and it is the remedy provided by law which fixes the nature of the instrument. It must be foreclosed in order to render it available.¹ On the other hand, by giving a mortgage upon his goods or chattels the owner transfers them; the transfer to be void on payment of the money or on performance of the duty or obligation thereby secured. There is no real difference between the two instruments, in respect to the terms employed in them; there are formal words of transfer in each; and there is a condition embodied in each, on the fulfillment of which the instrument is by its terms rendered void; and there is also in each a power to sell the property and apply the proceeds to the payment of the debt secured. The difference between the two is found in the remedies given by law; it is not found in the instruments themselves.²

Under the strict rules of law, a mortgage of lands was held to convey the title; and after a forfeiture the mortgagee was allowed to recover the premises by an action of ejectment.³ By degrees the right of redemption was established in courts of equity; and at length it has become settled and familiar law, that the title does not pass on the execution of the mortgage, nor on a failure to pay the sum secured on the day it becomes due.⁴ There must be either a sale of the premises on notice, under the power contained in the mortgage, or a foreclosure by suit. In either of these ways the title will pass and the right of redemption be cut off.⁵

§ 179. A mortgage of goods or chattels is something more than a security; it is a sale, and operates as a transfer of the legal title to the

fixed time of redemption, and the debtor make delay in payment, the creditor may quicken the redemption by a writ (of which he gives the form), and which requires the debtor, without delay, to redeem the pledge. On return of the writ, if the defendant confessed the pledge, he was commanded to redeem in a reasonable time, and on default the creditor had license to treat the pledge as his own. But if the pledge was made without any particular term, the creditor might demand his debt at any time, and the debt being discharged, the creditor was bound to restore the pledge without any deterioration." Glanville, Lib. 10, c. I. p. 59; 1 Reeves, 161, 162.

¹ Stewart v. Hutchins, 13 Wend. 483; affirmed, 6 Hill, 143.

² The forms now in use in this State show this close resemblance.

³ Jackson v. Dubois, 4 John. R. 216.

⁴ Stoddard v. Hart, 23 N. Y. 556, 559; Williams v. Townsend, 31 N. Y. 411; Trustees of Union College v. Wheeler, 61 N. Y. 88; Hubbell v. Moulson, 53 N. Y. 225.

⁵ Brown v. Frost, 10 Paige, 243. One who is not notified or not made a party may redeem; he is not affected. Gage v. Brewster, 31 N. Y. 218; Tuthill v. Tracy, 31 N. Y. 157; Cheney v. Woodruff, 45 N. Y. 98; Reynolds v. Park, 53 N. Y. 36, 41; Miner v. Beekman, 50 N. Y. 337, 344.

mortgagee, subject only to be defeated by a performance of the condition;¹ and his title becomes absolute at law on the mortgagor's failure to pay according to its terms.² If by the terms of the mortgage the mortgagor is entitled to the possession until the day of payment arrives, he has a possessory interest in the goods and a right of redemption; the property may therefore be sold on an execution against him, and the purchaser will acquire his interest and the right to redeem.³ When the instrument defines the circumstances under which the right of possession is to vest in the mortgagee, the inference is that in the meantime the possession is to remain with the mortgagor; and in such cases also the mortgagor has a possessory interest in the goods, until default is made in the payment.⁴ And when the mortgage, besides defining the circumstances under which the mortgagee has the right to take possession of the property, contains a clause authorizing him to take the possession at any time when he deems himself unsafe, the mortgagor's interest remains until default is made in payment, or until the mortgagee takes possession in good faith for his own safety.⁵ The purchaser under a sale subject to the mortgage acquires the exact interest of the mortgagor; he does not become personally bound to pay the debt secured by the mortgage.⁶

¹ *Butler v. Miller*, 1 Comst. (N. Y. Rep.) 496; *Bissell v. Pearce*, 28 N. Y. 252; *Shuart v. Taylor*, 7 How. Pr. 251; *Coles v. Clark*, 3 Cush. 399; *Bordwell v. Collie*, 45 N. Y. 494; *Hembree v. Blackburn*, 16 Oregon, 153; *Porter v. Parmly*, 43 How. Pr. 445.

² *Burdick v. McVanner*, 2 Denio, 170; *Fuller v. Acker*, 1 Hill, 473; *Brown v. Bement*, 8 John. R. 96; *Ackley v. Finch*, 7 Cowen, 290; *Langdon v. Buel*, 9 Wend. 80; *Hudson v. Walter*, 34 How. Pr. 385; 39 Barb. 606; *Casserly v. Witherbee*, 119 N. Y. 522; *Duffus v. Bangs*, 43 Hun, 52; *Bragelman v. Daue*, 69 N. Y. 69; *Moore v. Prentiss Tool & Supply Co.*, 133 N. Y. 144; *Sherman v. Slayback*, 58 Hun, 255. See *Leadbetter v. Leadbetter*, 125 N. Y. 290; *Manchester v. Tibbetts*, 121 N. Y. 219; *Porter v. Parmly*, 43 How. Pr. 445. While this doctrine is technically and theoretically correct, yet practically the substantial title remains in the mortgagor with all the incidents of a legal title, and he retains the use, control and benefit of the property subject to the mortgage. *Moore v. Prentiss Tool & Supply Co.*, 133 N. Y. 144.

³ *Hull v. Carnley*, 11 N. Y. 501; *S. C.* 17 N. Y. 202; *Goulet v. Asseler*, 22 N. Y. 225.

⁴ *Hall v. Sampson*, 35 N. Y. 274.

⁵ *Hathaway v. Brayman*, 42 N. Y. 322. It is clear that if a person takes property under such a clause in a mortgage, not because he deems himself unsafe or the debt insecure, but inspired by other and unjustifiable motives, he will not be protected by the power conferred in the instrument. *Hyer v. Sutton*, 59 Hun, 40; *Werner v. Bergman*, 28 Kansas, 65; *Forlong v. Cox*, 77 Ill. 293; *Davenport v. Ledger*, 80 Ill. 574; *Roy v. Goings*, 96 Ill. 361.

⁶ *Hamil v. Gillespie*, 48 N. Y. 556. As against creditors the mortgage must be refilled within the year. *Porter v. Parmly*, 52 N. Y. 185; *Tremaine v. Mortimer*, 128 N. Y. 1.

§ 180. The right of property draws after it the right of possession; and when there is no provision in the chattel mortgage giving the possession to the mortgagor, the mortgagee, having the right of property until defeated by the performance of the condition, has as an incident thereto the right of possession, and may therefore take the goods into his own custody, or maintain trespass or trover for them against any one who takes or converts them to his own use.¹ The danger clause is to be construed by itself; the mortgagee's right of possession under it does not accrue until he takes action under it; nevertheless its insertion in the mortgage implies an understanding between the parties that the mortgagor is to retain the property until the mortgagee deeming himself unsafe takes the possession.²

§ 181. In equity the mortgagor has a right to redeem, even after a default has been made; he retains the right until it is cut off by a foreclosure or sale under the mortgage.³ And he may enforce this right by an action in equity;⁴ and in this action he is entitled to an account of the rents or reasonable hire of the property, with a view to ascertain the true amount due; and he ought to be accountable for the reasonable expenses incurred in the keeping of the property, where these exceed its rental value.⁵ Asking to redeem on equitable grounds, he must do equity; and he should tender the amount due with interest, including all reasonable charges, before he brings his action. To avoid the payment of costs, he must offer all that equity can require of him in the premises.⁶

The mortgage usually states the true amount to secure which it is given; and sometimes it is given to secure contingent liabilities up to a certain amount;⁷ in this case the mortgagor is entitled to redeem on paying the liabilities particularly specified.⁸

¹ *Moore v. Prentiss Tool & Supply Co.*, 133 N. Y. 144, 149; *Coles v. Clark*, 3 Cush. 399; *Shuart v. Taylor*, 7 How. Pr. 251. See *Mattison v. Baucus*, 1 N. Y. (1 Comst.), 295; and *Butler v. Miller*, 1 N. Y. 496; *Chadwick v. Lamb*, 29 Barb. 518; 13 N. Y. 556, 565; *Hall v. Sampson*, 35 N. Y. 274; S. C. 19 How. Pr. 481.

² *Hall v. Sampson*, *supra*; *Huggins v. Fryer*, 1 Lansing, 276.

³ *Charter v. Stevens*, 3 Denio, 33; *Patchin v. Pierce*, 12 Wend. 61; *Porter v. Parmly*, 43 How. Pr. 445; S. C. 52 N. Y. 185; *Sherman v. Slayback*, 58 Hun, 255, 261.

⁴ *Pratt v. Stiles*, 17 How. Pr. 211, 221; *Hinman v. Judson*, 13 Barb. 629, 630; *West v. Crary*, 47 N. Y. 423.

⁵ *Mickles v. Dillaye*, 17 N. Y. 80; a suit for redemption by the mortgagor of real estate.

⁶ *Brockway v. Wells*, 1 Paige Ch. R. 617; *Vroom v. Ditmas*, 4 Paige Ch. 526, 535; *Archer v. Cole*, 22 How. Pr. 411; *Halstead v. Swartz*, 46 How. Pr. 289.

⁷ *Beers v. Waterbury*, 8 Bosw. 396.

⁸ This is a clear inference from the adjudications. *Miller v. Lockwood*, 32 N. Y. 293, 299.

§ 182. The mortgagee is not obliged by law to take any action by way of foreclosure; he may take possession and hold the property; after forfeiture, no further act is necessary to give him the legal title. Though the mortgage contains a power of sale, he is not bound to act under it; but if he takes and retains the goods, and they are in value equal to his demand, he cannot afterwards maintain an action for the debt.¹

§ 183. Payment of the debt extinguishes the mortgage;² made after, it is a waiver of the forfeiture, and will extinguish the mortgagee's title.³ A part payment, or a new security given to the mortgagee, does not impair his rights under the mortgage.⁴ A tender of the amount due after a forfeiture does not take from the mortgagee his legal title;⁵ and yet it is clear that his acceptance of the money does deprive him of his title to the goods. And where he sells a part of them under the power, and realizes from the sale sufficient to pay the debt, his mortgage is satisfied and he has no title to or interest in the remainder:⁶ he has acquired all that the instrument was designed to give him. On the reason of this rule, he cannot at any time safely refuse a tender of the amount due; he certainly cannot without subjecting himself to an action in equity to redeem. Besides, why should a mortgage of goods and chattels be treated differently from a mortgage upon real estate? Only prudential reasons can be assigned for the different remedies given under them.

§ 184. The form of chattel mortgage now in general use authorizes the mortgagee, on a default in payment, to take possession of the property and sell it at public or private sale, and apply the proceeds to the payment of the debt. Under this power it has been held that a fair sale, in good faith, for a reasonable price, will foreclose the mortgagor's right to redeem; and it cannot be denied that such a sale is within the terms of the authority. In the case of a pledge, one object of the sale is to transfer the title; under the mortgage, the title is already perfect in the mortgagee; and the object of the sale is to convert the property into its equivalent in money, and apply it on the debt. This being done in the manner agreed upon between the parties, no ground is left for an action in equity to redeem, the only remedy left to the mortgagor.⁷

¹ *Burdick v. McVanner*, 2 Denio, 170; *Case v. Boughton*, 11 Wend. 106; *Stoddard v. Denison*, 2 Sweeney, 54; *Sherman v. Slayback*, 58 Hun, 255, 261.

² *Monnot v. Ibert*, 33 Barb. 24.

³ *West v. Crary*, 47 N. Y. 423; *Park v. Hall*, 2 Pick. 206, 210; *Barry v. Bennett*, 7 Metc. 354.

⁴ *Patchin v. Pierce*, 12 Wend. 61; *Miller v. Lockwood*, 32 N. Y. 293.

⁵ *Brown v. Bement*, 8 John. 96; *Noyes v. Wyckoff*, 30 Hun, 466.

⁶ *Charter v. Stevens*, 3 Denio, 33.

⁷ *Chamberlain v. Martin*, 43 Barb. 607, and cases there cited. See *Ballou v. Cunning-*

The sale must be made pursuant to the terms of the power; if the authority be to take and sell at public auction, the sale must be made in that manner, or it cannot be effectual as a foreclosure: there must be the usual auction sale, on reasonable notice.¹ On a sale in this manner, conducted fairly, the mortgagee may purchase the property;² as he may on a foreclosure sale of real estate.

§ 185. When given to secure the payment of money, the mortgage of either real or personal estate is but an accessory or incident to the debt; and hence a change in the form of the debt does not affect its validity.³ An assignment of the debt passes the interest in the mortgage. If by a special agreement the mortgage is not to accompany the debt assigned, it is extinguished and ceases to be a subsisting security.⁴ Where a mortgage was given to secure a note payable to order, and the holder indorsed the note over, and at the same time delivered the mortgage to the indorsee, but made no assignment of it in writing, it was held that the transfer of the note carried with it the mortgage. The debt is the principal, and the security the incident; and the assignment of the principal draws after it the incident.⁵ For the same reason, the creditor may assign the principal debt to a third person, and give him the benefit of a pledge which he holds to secure the payment of the debt. The pledger is not injured by this; he retains his right to redeem on payment of the amount due on the debt, the same as before the assignment; and the assignee acquires precisely the rights of the pledgee subject to the same obligations.⁷

§ 186. Though formerly much blended in the books, there is now a clear discrimination established between a chattel mortgage and a pledge. A pledge of goods or chattels is completed by a delivery of them; it does not transfer the title; it only gives to the pledgee a lien

ham, 60 Barb. 425; S. C. 4 Lansing, 74; and *Stoddard v. Denison*, 2 Sweeney 54; 38 How. Pr. 296; 7 Abbott's Pr. N. S. 309.

¹ *Charter v. Stevens*, 3 Denio, 33.

² *Olcott v. Tioga R. R. Co.*, 40 Barb. 179; S. C. 27 N. Y. 546; *Casserly v. Witherbee*, 119 N. Y. 522; *Edmiston v. Brucker*, 40 Hun, 256; *King v. Walbridge*, 48 Hun, 470; *Elliott v. Wood*, 45 N. Y. 71; *Hall v. Ditson*, 5 Abb. New Cas. 198.

³ *Hill v. Beebe*, 13 N. Y. 556; *Gregory v. Thomas*, 20 Wend. 17.

⁴ *Jackson v. Willard*, 4 John. R. 41, 43; *Jackson v. Blodget*, 5 Cowen, 202; *Martin v. Mowlin*, 2 Burr. 979; *Green v. Hart*, 1 John. R. 581.

⁵ *Pattison v. Hull*, 9 Cowen, 747, 754; *Kuhn v. Bankes*, 15 Neb. 92; Cal. Civil Code, §§ 2936; and see *Morris v. McCulloch*, 83 Pa. St. 34; *Alabama Gold Life Ins. Co. v. Hall*, 58 Ala. 1; *Langdon v. Buel*, 9 Wend. 80; *Gould v. Ellery*, 39 Barb. 163; *Wyman v. Smead*, 31 How. Pr. 1, 353.

⁶ *Chapman v. Brooks*, 31 N. Y. 75, 84.

⁷ *Kemp v. Westbrook*, 1 Vesey, 178; *Ratcliff v. Vance*, 2 Const. Rep. S. C. 239; *Brown v. Warren*, 43 N. H. 430.

upon them.¹ The form of the contract is not controlling; if there be a transfer of the property, it is more than a pledge, it is a mortgage.²

There is no difficulty in tracing this line of discrimination between a mortgage and a pledge, in contracts relating to goods and chattels. Giving a bill of sale of chattels, with the intention of securing the payment of a debt, or to be held as collateral security for moneys to become due, is to be treated as a mortgage; it is a transfer of the property, to become void on payment of the debt thereby secured.³ The law gives effect to the intention with which the bill of sale is executed and delivered; a separate written or verbal defeasance will convert the bill of sale into a mortgage.⁴ And the effect of the transfer will not be changed by a stipulation on the part of the assignee to prepare the goods for market.⁵

§ 187. The difference between an absolute conveyance and a mortgage of lands is broad enough; and yet there is a class of cases in which a deed is converted into a mortgage; *e. g.*, when the deed is given on account of a present loan, or precedent debt, with a concurrent agreement in writing, or by parol, for a redemption at a future time upon payment of the debt.⁶ The law looks through the forms of the transaction, and seeks to carry into effect the real intent of the parties; and as a rule, where the conveyance is made on an application for a loan of money, it will be deemed a mortgage in case the grantee agrees to receive back his money and interest, or a larger sum, and reconvey the property within a specified time thereafter, whatever form the writings may assume, the real object being a loan of money.⁷ Where the conveyance is not in truth made as a security for a loan, an agreement to reconvey at a future time, at the election of the grantor, affords no evidence that the deed was intended as a mortgage.⁸ A col-

¹ *Brownell v. Hawkins*, 4 Barb. 494; *Cortelyou v. Lansing*, 2 Caines' Cas. 200; *Brown v. Bement*, 8 John. R. 96; *McLean v. Walker*, 10 John. R. 471, 474; *People v. Remington*, 59 Hun, 282, 287.

² *Langdon v. Bush*, 9 Wend. 80; *Bunacleugh v. Poolman*, 3 Daly, 236.

³ *Barrow v. Paxton*, 5 John. R. 258; *Marsh v. Lawrence*, 4 Cowen, 461; *Siedenbach v. Riley*, 111 N. Y. 560; *Smith v. Beattie*, 31 N. Y. 542; *People v. Remington*, 59 Hun, 282; *Blake v. Corbett*, 120 N. Y. 327; *Woodworth v. Hodgson*, 56 Hun, 236.

⁴ *Brown v. Bement*, *supra*; *Hall v. Tuttle*, 8 Wend. 375; *King v. Van Vleck*, 40 Hun, 68; 109 N. Y. 363.

⁵ *Smith v. Beattie*, 31 N. Y. 542, 544.

⁶ *Strong v. Stewart*, 4 John. Ch. 167; *Henry v. Davis*, 7 John. Ch. 40; *Clark v. Henry*, 2 Cowen, 324; *Roach v. Cosine*, 9 Wend. 227, 231; *Horn v. Keteltas*, 46 N. Y. 605; *Odell v. Montvoss*, 68 N. Y. 499; *Kraemer v. Adelsberger*, 122 N. Y. 467; *Simon v. Schmidt*, 41 Hun, 318; *Erwin v. Curtis*, 43 Hun, 292.

⁷ *Holmes v. Grant*, 8 Paige's Ch. R. 243; *Robinson v. Cropsy*, 6 Paige's Ch. 480.

⁸ *Glover v. Payn*, 19 Wend. 518.

lateral agreement by the grantor to repay the money tends to show that the conveyance was intended as a mortgage; and the absence of such an agreement tends to prove that it was not so intended.¹

§ 188. A discrimination must be made between a conditional sale and a mortgage of goods or chattels. A sale and delivery on condition that the purchaser is to acquire the title to the property on payment of the purchase money, does not vest the title in him until the condition is fulfilled.² By the very terms of the sale, the seller is here to continue the owner until the price is paid, and the transfer takes effect on the payment; it is not a present sale, with a mortgage back to secure the purchase money³—a form of contract which includes first a sale, and second an agreement in the nature of a chattel mortgage for the price to be paid.⁴ The collateral agreement here does not prevent the transfer of the title; and though informal, it is to be treated and must be filed as a chattel mortgage.⁵

CONTRACT.

- I. Capacity to make.
- II. Right or power to create a pledge.
- III. Subject of pledge.
- IV. Mode of making a pledge.
- V. Relation of pledge to the original contract.
- VI. Pledgee's duty in preserving.
- VII. What Property in the Pledgor and Pledgee; and resulting Rights and Duties.
- VIII. Sale or foreclosure.
- IX. Restitution.
- X. Remedies.

§ 189. I. *Capacity to Make.* The general rule that the deeds and

¹ Conway's Exrs. v. Alexander, 7 Cranch. 218; Flagg v. Mann, 4 Pick. 467.

² Herring v. Hoppock, 15 N. Y. 409; Ballard v. Burgett, 40 N. Y. 314; Sargent v. Metcalf, 5 Gray, 506; Hart v. Carpenter, 24 Conn. 427; Rodney Hunt Machine Co. v. Stewart, 57 Hun, 545; Lewis v. McCabe, 49 Conn. 140; Hotchkiss v. Higgins, 52 Conn. 205; Sumner v. Woods, 67 Ala. 139; Cole v. Berry, 13 Vroom (N. J.), 308; Weeks v. Pike, 60 N. H. 447; Heinbockle v. Zugbaum, 5 Mont. 344; Warner v. Roth, 2 Wy. 63; Aultman v. Mallory, 5 Neb. 178; Segrist v. Crabtree, 131 U. S. 287; McGinnis v. Savage, 29 W. Va. 362; Dodd v. Bowles, 3 Wash. Terr. 383; Simpson v. Shackleford, 49 Ark. 63; Empire State Type Founding Co. v. Grant, 114 N. Y. 40; Perry v. Young, 105 N. C. 463; Russell v. Harkness, 4 Utah, 197; Luther v. Cote, 61 N. H. 129.

³ Brewster v. Baker, 20 Barb. 364; Grant v. Skinner, 21 Barb. 581; Strong v. Taylor, 2 Hill, 326; Barrett v. Pritchard, 2 Pick. 512; Herring v. Willard, 2 Sandf. 418.

⁴ Dunning v. Stearns, 9 Barb. 639; McComber v. Parker, 14 Pick. 497.

⁵ Thompson v. Blanchard, 4 N. Y. 503.

contracts of an infant are not void, but only voidable, supplemented by the rule that the defense of infancy is a personal privilege, renders it quite plain that an infant may be a party to a contract of pledge.¹ If he delivers goods or chattels in pledge, to secure the payment of his debt, the pledge must remain valid until he repudiates the transaction. Would a sale of the chattels by him operate as a disaffirmance of the contract of pledge? It would not of itself, because the sale is not inconsistent with the pledge: it does not repudiate the pledge.² Moreover, if the chattels were delivered in pledge at the time his debt was contracted, it would be necessary for him to rescind the whole transaction, and restore the consideration received by him when he incurred the debt. The debt having been incurred for property still in his possession, he cannot both keep the property and take back that which he has delivered as security for the payment.³

The pledge takes effect by delivery of his hand like a sale and delivery, and hence a rescission will not be implied from a doubtful act;⁴ nor can it be so readily made as it can where he gives a mortgage but does not deliver the chattels covered by it; a subsequent absolute sale and delivery of the chattels disaffirms the contract evidenced by the mortgage.⁵

§ 190. The legal incapacity of a married woman under the common law to contract was not based upon the theory of personal incapacity to transact business; she was always allowed to act as her husband's agent, with authority.⁶ And her act, with her husband's authority, binds him; he cannot recall it after it has been executed.⁷ Her act binds him on the theory of agency, and not on the ground of the marital relation subsisting between them.⁸

Under our recent remedial statutes a married woman may now take and acquire a separate property, and enjoy and transfer the same as freely as an unmarried woman; and she may carry on any business on her separate account. Entering upon a business, she acts for herself;

¹ *Slocum v. Hooker*, 13 Barb. 536. This case involves both of the rules referred to. See also, *Blake v. Supervisors of L. Co.*, 61 Barb. 149.

² *Palmer v. Miller*, 25 Barb. 399; the case of a deed of premises covered by a mortgage made by the infant.

³ *Bartholomew v. Fennimore*, 17 Barb. 428; *Kitchen v. Lee*, 11 Paige's Ch. 107; *Gray v. Lessington*, 2 Bosw. 257; 33 Conn. 201.

⁴ *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. Ch. 544.

⁵ *Chapin v. Shafer*, 49 N. Y. 407.

⁶ *Goodwin v. Kelly*, 42 Barb. 194.

⁷ *Griffen v. Banks*, 37 N. Y. 621, 624; *Edgerton v. Thomas*, 9 N. Y. 40.

⁸ *Kowing v. Manly*, 49 N. Y. 192.

she is treated as a *feme sole*.¹ And as she may make all manner of contracts relating to the business, she can undoubtedly bind herself by a pledge or mortgage of goods, to secure the payment of debts incurred by her in the line of the business.² As she may charge her separate property as surety for the debt of her husband, there is no reason why she may not directly pledge her goods or chattels for his debt.³ Under the first statute, a married woman was empowered to take and hold property to her sole and separate use, and convey the same; she was not in terms authorized to bind herself by contract; and though her separate property was a legal estate, her engagements in reference to it were necessarily enforced on principles of equity.⁴ Under the more recent statute, she may also acquire property from her earnings or business, and may make sales and transfers of the same, and may carry on any business on her separate account; and is liable on her contracts in the business, and for the manner in which she transacts her business, like an unmarried woman.⁵ Under still more recent statutes a married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate will be liable thereon whether the contract relates to her separate estate or business or otherwise, and whether it purports to charge her separate property or otherwise.⁶

§ 191. II. *Right to make a Pledge.* It is of course necessary that the person making a pledge of goods as security for a debt should own them, or at least have the authority to deposit them in pledge. The contract passes a certain interest or special property in the goods to the pledgee; and the pledgor impliedly stipulates that he possesses the right which he assumes to transfer.⁷ To the extent of that right or interest, he in fact warrants the title as much as does the vendor on an absolute sale;⁸ especially where the debt is contracted at the time the pledge is delivered. If he undertake to pledge property that belongs to another, without his consent, he cannot afterwards, so long as the owner does not

¹ Lindner v. Sohler, 51 Barb. 322; Peak v. Lemon, 1 Lansing, 295. See Anderson v. Mather, 44 N. Y. 249.

² Talmon v. Hawxhurst, 4 Duer, 221.

³ Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613.

⁴ Hauptman v. Catlin, 29 N. Y. 247; Yale v. Dederer, 18 N. Y. 265; 22 N. Y. 450; Ballin v. Dillaye, 37 N. Y. 35. See the statute of 1848 as amended in 1849.

⁵ Anderson v. Mather, 44 N. Y. 249; Rowe v. Smith, 45 N. Y. 230; Fairbanks v. Mothersell, 60 Barb. 406; Warner v. Warren, 46 N. Y. 228.

⁶ Laws of 1884, Chap. 381, as amended by Laws of 1892, Chap. 594.

⁷ Mairs v. Taylor, 40 Penn. St. 466.

⁸ Burt v. Dewey, 49 N. Y. 283; Rew v. Barber, 3 Cowen, 272, 280; Defreeze v. Trumper, 1 John. R. 271.

intervene, claim to have it restored until his debt is discharged.¹ So, too, though he is not the owner at the time the pledge is made, if he subsequently acquire the property, by what title soever, his ownership will be deemed to relate back to the time of the contract, and the pledge will stand good.² Though the right of the true owner is not affected by a pledge made without his consent, the party making the pledge will not be permitted to assert his own want of title.³ The civil and common law agree that an implied warranty is annexed to every sale of personal chattels, in respect to the title of the vendor; and the reason of the rule applies to the case where there is a transfer of goods in pledge, on the creation of a debt.⁴

§ 192. As no one can convey the title to another man's property without his consent, so it is quite clear that, as a rule, he cannot pledge it or encumber it without some authority.⁵ *E. g.*, a partner cannot pledge securities or goods belonging to the firm to secure the payment of money advanced to him as an individual.⁶ And a trustee cannot pledge stocks held by him in that capacity, to secure the payment of his individual debt; the act is unlawful, and the transfer of the scrip standing in his name as trustee carries with it notice of his want of authority.⁷ The rule must be different where the owner permits his stocks to be transferred to another and held by him as the apparent owner, under a secret trust; because in this case the owner enables the trustee to appear with the title standing in his name, and to sell the stock as his own. And after he thus sells the stock or pledges it for an advance of money, the honest purchaser or pledgee is protected, while the party who takes the stock in pledge or purchases it in bad faith, or with knowledge of the facts, takes subject to the owner's title.⁸ The same rule applies where an agent to sell is entrusted with the title; he has the power to sell in

¹ He is estopped from setting up a title to the goods subsequently acquired. *Goldstein v. Hart*, 30 Cal. 372.

² Code of Louisiana, Arts. 3109 to 3114.

³ *Jarvis v. Rogers*, 13 Mass. R., 105; *Duell v. Cudlipp*, 1 Hilt. 166.

⁴ *Defreeze v. Trumper*, *supra*; 2 Bl. Comm. 471; *Burt v. Dewey*, *supra*; *Mairs v. Taylor*, 40 Penn. St. 466.

⁵ *Swett v. Brown*, 5 Pick. 178.

⁶ *Ex parte McKenna, in re Mortimer*, 7 Jur. N. S. 588. After a copartnership has been dissolved by the death of one of the partners, the surviving partner may borrow money to meet the firm obligations and pledge the copartnership property for its repayment. *Durant v. Pierson*, 124 N. Y. 444, 452.

⁷ *Shaw v. Spencer*, 100 Mass. 382, 389.

⁸ *Crocker v. Crocker*, 31 N. Y. 507; 28 How. Pr. 583 n.; 17 How. Pr. 504. See *Anderson v. Nicholas*, 28 N. Y. 600; and *Calais Steamboat Co. v. Van Pelt*, 2 Black. 372.

violation of his instructions.¹ And since a sale or transfer of stock is usually made on the faith of the apparent title, the owner, rather than an innocent purchaser or pledgee for present advances, should bear the consequences of the agent's bad faith. Certainly we find few cases in our reports where, under these circumstances, the owner ventures to prosecute his title as against such purchasers; and many cases where he pursues his remedy against his defaulting agent.²

§ 193. In the transfer of choses in action or securities, not negotiable, the rule is that the purchaser or assignee takes them subject to all defenses, legal and equitable, existing in favor of the original debtor or any prior party; in other words, the assignee takes the exact interest of his assignor;³ and a second assignee succeeds to all the rights and becomes subject to all the disabilities of his assignor, to all the defenses existing against him.⁴ This being the general rule applicable to choses in action, that class of cases will hardly be much extended in which the pledgee or purchaser is held to acquire the title discharged of a secret trust: a class which stand upon the well established principle, that innocent purchasers for value from an apparent owner, clothed with the legal title, are to be protected. Sales and pledges of goods by factors entrusted with documentary evidence of title are thus protected;⁵ and for a similar reason, a transfer or pledge of stocks, made

¹ *Parsons v. Martin*, 11 Gray (Mass.), 111; as was done in *Clark v. Meigs*, 10 Bosw. 337.

² *Markham v. Jaudon*, 41 N. Y. 235; *Baker v. Drake*, 53 N. Y. 211.

³ *Bush v. Lathrop*, 22 N. Y. 535; *Briggs v. Langford*, 107 N. Y. 680; *Decker v. Boice*, 83 N. Y. 215; *Davis v. Leopold*, 87 N. Y. 620; *Davis v. Bechstein*, 69 N. Y. 440; *Bennett v. Bates*, 94 N. Y. 354, 363; *Hill v. Hoole*, 116 N. Y. 299; *Greene v. Warnick*, 64 N. Y. 220. Latent equities? See *Reeves v. Kimball*, 40 N. Y. 299. *Bush v. Lathrop* has been criticised in subsequent cases, and so far modified as to exclude from the operation of the principles there laid down the case of the purchase in good faith of a non-negotiable instrument from the assignee of the real owner upon whom he has by assignment conferred the apparent absolute ownership, when such purchase has been made in reliance upon the title apparently acquired by such assignee. This modification is placed upon the ground of estoppel; and it is held that the real owner has, by the act of investing another with the apparent ownership of the property, estopped himself from disputing the title of one who thereafter acquires it in good faith from such assignee. See *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Armour v. Mich. C. R. Co.*, 65 N. Y. 111, 122. But with the exception mentioned the doctrine of the case stands unquestioned. *Fairbanks v. Sargent*, 104 N. Y. 108.

⁴ *Mason v. Lord*, 40 N. Y. 476, 487. See *Fairbanks v. Sargent*, *supra*, and cases cited in preceding note.

⁵ *Edwards on Factors and Brokers*, §§ 45 to 57. *Laws of 1830*, Chap. 179, § 3. To bring a case within the operation of the section cited, the factor or other agent must be consciously and voluntarily "entrusted" with the possession of the docu-

by an agent entrusted with the title, for money advanced upon them, is upheld in favor of a party thus induced to act upon the written evidence of title.¹ It is but just that the negligent or careless owner should be left to his remedy against his unfaithful agent.² Third parties, acting on the *indicia* of title furnished by the true owner, should not be deprived of securities so taken in good faith.

§ 194. The general principle is that the person making a pledge can convey to the pledgee no greater interest in the thing pledged than he himself possesses. The exceptions to this rule only serve to make it plain. *E. g.*, at common law a factor may deliver the goods entrusted to him to a third person as his agent, with notice of and in order to preserve his lien; this being a continuance of the factor's possession.³ But the factor cannot by the rule of the common law pledge the goods of his principal, even to the extent of his lien;⁴ he cannot transfer them to a third person so as to create a privacy between him and the owner.⁵ Under the law as now modified by statute, the factor having the title vested in him may pledge the goods for advances made in good faith, on the strength of the written or documentary evidence of title.⁶ Under such circumstances the factor is deemed the true owner, and his pledge of the goods for advances is held valid in favor of the party making a loan on the goods, and taking them in possession as a security;⁷ that is to say, the factor is deemed the true owner where he has written evidence of the title, and the purchaser or pledgee deals with him in the honest belief that he is the true owner.⁸

ments or merchandise; and the section has no application whatever to a case where the documents or goods are taken by trespass or theft, and the possession of the factor or agent is from the beginning tortious, wrongful and unlawful. *Soltau v. Gerdau*, 119 N. Y. 380; *Collins v. Ralli*, 20 Hun, 246; S. C. 85 N. Y. 637; *Hentz v. Miller*, 94 N. Y. 64. See also, *Dorrance v. Dean*, 106 N. Y. 203; *Kinsey v. Leggett*, 71 N. Y. 395.

¹ *McNeil v. The Tenth National Bank*, 46 N. Y. 325; S. C. 55 Barb. 59.

² *Stenton v. Jerome*, 54 N. Y. 480.

³ *Urquhart v. McIver*, 4 John. R. 103; *Warner v. Martin*, 11 How. U. S. 209; *Lansat v. Lippincott*, 6 Serg. & Rawle, 386; *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415.

⁴ *Rodrigues v. Hefferman*, 5 John. Ch. 417, 429; *Commercial Nat. Bank v. Heilbrouner*, 108 N. Y. 439, 444. See *Mechanics & Traders' Ins. Co. v. Kiger*, 103 U. S. 352; *McCreay v. Gaines*, 55 Texas, 485; *Gray v. Agnew*, 95 Ill. 315.

⁵ *Sally v. Rathbone*, 2 Maule & Selw. 298; *Moffatt v. Wood*, *Selden's Notes*, Nos. 5, 14; *Kennedy v. Strong*, 14 John. R. 128; *Buckley v. Packard*, 20 John. R. 422; *Waltham v. Wetmore*, 1 E. D. Smith, 722-25; *Bonito v. Mosquera*, 2 Bosw. 401, 427; this case overruled on another point in *Cartwright v. Wilmerding*, 24 N. Y. 521.

⁶ *Cartwright v. Wilmerding*, *supra*; *Fourth Nat. Bank v. American Mills Co.*, 137 U. S. 234.

⁷ *Pegram v. Carson*, 10 Bosw. 505.

⁸ *Stevens v. Wilson*, 3 Denio, 472; 6 Hill, 512.

§ 195. The statute specifies the circumstances under which the apparent owner is to be deemed the true owner. 1. The party in whose name any merchandise is shipped with the owner's consent.¹ 2. The consignee having the bill of lading making the goods deliverable to him or to his order.² 3. The party holding the custom-house permit, indicating ownership, and authorizing a landing of the goods from the importing ship.³ 4. The party holding the warehouseman's receipt, an evidence of title, which may be transferred by its delivery with an order thereon for the goods, and with an authority to make the withdrawal entry at the custom-house.⁴ The object of the statute is to protect persons dealing in good faith with apparent owners, and it specifies these several evidences of title as documents on which it shall be safe to act; acting on which in good faith, the purchaser or pledgee is protected.⁵ Mere possession by a factor does not give him the power to pledge or sell his principal's goods.⁶ Possession for the purpose of sale enables him to dispose of the goods, and will usually enable him to pledge them for advances.⁷ It will certainly enable him to store the goods and take a receipt for them, and thereon procure advances.

§ 196. We have still another exception to the general rule, growing out of the peculiar qualities of commercial or negotiable paper. A note payable to bearer, or to order and indorsed by the payee in blank, so that it is transferable by delivery, may be transferred or pledged for present advances, at any time before it is due, by a party having merely

¹ Edwards on Factors and Brokers, §§ 37-44.

² *Idem*, §§ 45-53.

³ *Idem*, § 54.

⁴ *Idem*, § 55.

⁵ *Dows v. Greene*, 24 N. Y. 638; 2 Bosw. 402, 429; *Allen v. Williams*, 12 Pick. 297; *Mottram v. Heyer*, 5 Denio, 629; *Waldron v. Romaine*, 22 N. Y. 368. But to secure protection to a person advancing money to a factor holding a bill of lading, it is requisite that the advance shall be made upon the faith of the bill of lading and not upon the representations of the factor. *Moors v. Kidder*, 34 Hun, 534; S. C. 106 N. Y. 32; *First Nat. Bank v. Shaw*, 61 N. Y. 283; *Kinsey v. Leggett*, 71 N. Y. 387, 395.

⁶ *Nickerson v. Darrow*, 5 Allen (Mass.), 419; *Cook v. Adams*, 1 Bosw. 497; *Moors v. Kidder*, 34 Hun, 534, 536; S. C. 106 N. Y. 32; *McCreary v. Gaines*, 55 Texas, 485; *Soltan v. Gerdau*, 119 N. Y. 380, 397.

⁷ *Pegram v. Carson*, 10 Bosw. 505. A power to sell is not a power to pledge to secure money borrowed. An agent to sell is not an agent to pledge. *Henry v. Marvin*, 3 E. D. Smith, 71; *Bonito v. Mosquera*, 2 Bosw. 401. And a blank transfer of a certificate of stock with irrevocable power of attorney to transfer, signed by the person appearing by the certificate to be the owner, does not confer upon the holder apparent authority as agent for such owner to pledge the stock as collateral (*Merchants' Bank v. Livingston*, 74 N. Y. 223), though it does confer upon him the power to sell or pledge it as owner. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325.

the custody of the note. The same is true of a draft or bill of exchange. The pledgee or transferee, taking the same for value, acquires the title and may recover on the instrument.¹

The pledgee is protected under the same circumstances and on the same principle as a purchaser of the paper.² Where the instrument is fraudulently diverted from the purpose for which it was made, or delivered in fraud of the owner as a collateral security, the transferee will only acquire the title and the right to recover on the paper where he parts with value when he takes it.³ He is to be protected as an honest holder for value; that is, where he has advanced money on the strength of it, or incurred some obligation, or surrendered some security, or entered into some new agreement giving time, as a consideration for the paper.⁴ Some of the States go farther and permit the pledgee to hold negotiable paper, railroad bonds payable to bearer, received in good faith on a pre-existing debt⁵—an extension of favor to this species of security beyond what equity seems to call for.

§ 197. The favor shown to negotiable paper is of long standing; it is actually treated as a species of currency. Chief-Justice EYRE: "For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped on the bills themselves. The property and the possession are inseparable. This was necessary to render them negotiable; and in this respect they differ essentially from goods, of which the property and possession may be in different persons. The property passing with the possession, it is admitted that

¹ *Bank of Chenango v. Hyde*, 4 Cowen, 567; *Coddington v. Bay*, 20 John R. 637.

² *Bank of N. Y. v. Vanderhorst*, 32 N. Y. 553, 557; *Brookman v. Metcalf*, 32 N. Y. 591.

³ *Coddington v. Bay*, supra; *Stalker v. McDonald*, 6 Hill, 93. See *Comstock v. Hier*, 73 N. Y. 269; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191; *Davis Sewing Machine Co. v. Best*, 105 N. Y. 59.

⁴ *Edwards on Bills and Notes*, 319-324, 688-691; 1 *Parsons on Bills and Notes*, 218-228. Holders of bank bills and negotiable paper are entitled to the peculiar advantages which the commercial law confers upon *bona fide* holders only when they have purchased such paper in good faith, in the usual course of business, before maturity, for full value, and without notice of any facts affecting the validity of the paper. *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191.

⁵ *Colver v. Benedict*, 13 Gray (Mass.), 7. Where a pre-existing debt has been actually and absolutely extinguished in consideration of the transfer of negotiable paper, the transferee is a holder for value within the rule protecting such a holder against prior equities. *Mayer v. Heidelberg*, 123 N. Y. 332. See *Brooklyn City & N. R. R. Co. v. Nat. Bank*, 102 U. S. 14, 31. It is otherwise where the note is taken as collateral security for an antecedent debt, the transferee parting with no value therefor. *Comstock v. Hier*, 73 N. Y. 269; *Duncomb v. New York, etc., R. R. Co.*, 84 N. Y. 190.

a banker who receives indorsed bills from his customer, to be got when due and carried to his account, may discount or sell them; why may he not pledge them? Either is a breach of confidence reposed in him, and he may sell, because the property has been entrusted to him; and he may pledge for the same reason; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner.”¹ The justice was speaking of a pledge made for present advances; and it is still quite clear that the pledgee receiving bills or notes in pledge at the time the debt is contracted may retain them as a collateral security; he is to be protected as much as a purchaser for value.²

§ 198. One who has an interest in goods for life or for years has a present right of property in them, and may pledge them, but only to the extent of his interest.³ Having possession of the goods, with a mere lien upon them, such as the pledgee himself possesses, he cannot rightfully sell them or again pledge them, separate from the debt on which he holds them as collateral security. He cannot divorce the pledge from the debt, which it is given to secure; but he may transfer the debt and give to the assignee the benefit of the pledge, the security for its payment.⁴ By selling or transferring the things pledged separate from the debt, unless the sale is made in due form by way of foreclosure, the pledgee renders himself liable for a conversion.⁵ He departs from his contract; he puts it out of his power to restore the pledge on payment of his debt—a thing which he cannot do with impunity. He has the power to separate the pledge from the debt, and it has been held that he has an interest capable of sale;⁶ on the analogy claimed to exist

¹ *Collins v. Martin*, 1 Bos. & Pull. 648.

² *Park Bank v. Watson*, 42 N. Y. 490; *Miller v. Race*, 1 Burr. R. 452; *Grant v. Vaughan*, 3 Burr. R. 1526; *Peacock v. Rhodes*, Doug. R. 633; *Lawson v. Weston*, 4 Esp. N. P. R. 56. A surrender of securities is a parting with value, and enables the pledgee to hold the paper. *Chrysler v. Renois*, 43 N. Y. 209; *Pratt v. Coman*, 37 N. Y. 440. Merely taking the paper as a pledge on a prior debt does not enable the pledgee to hold and recover on the paper. *Lawrence v. Clark*, 36 N. Y. 128. The party taking must act upon the security taken in pledge, in order to hold as pledgee for value; *Taft v. Chapman*, 50 N. Y. 445; and he must take without notice, that is, in good faith and for value; *Porter v. Parks*, 49 N. Y. 564; and the original debt must be legal; *Richardson v. Crandall*, 48 N. Y. 348.

³ *Howe v. Parker*, 2 T. R. 376.

⁴ *Chapman v. Brooks*, 31 N. Y. 75; *Lewis v. Mott*, 36 N. Y. 395, 401. See *Talty v. Freedmans Savings & Trust Co.*, 93 U. S. 321.

⁵ *Stearns v. Marsh*, 4 Denio, 227, 232; *Felt v. Hege*, 23 How. Pr. 359, 362. The last paragraph in the opinion, badly printed. See also, *Stenton v. Jerome*, 54 N. Y. 480.

⁶ *Bullard v. Billings*, 2 Verm. 309; *Saul v. Kruger*, 9 How. Pr. 569, 571; and see *Whitaker v. Sumner*, 20 Pick. 399, where the debt was sold without the pledge. In

between his interest and that of a mortgagor of goods still in possession. But there is this difference between the two interests; the mortgagor sells, on a condition; and the pledgor does not sell at all; the mortgagor retains the possession by the terms of the instrument, until a default is made in the payment; and the pledgee as against his debtor has but a mere lien upon the goods, a right to detain them till his debt is paid, with a final right to foreclose the lien; his interest in the goods is collateral to and dependent upon the debt. A sale or transfer of the debt will ordinarily draw after it a collateral security;¹ but will a sale of the collateral draw after it the debt, especially where the debt largely exceeds the value of the things pledged?²

§ 199. A mere equity of redemption under a chattel mortgage cannot be attached or sold under an execution.³ And as a lien is not the subject of a sale,⁴ the pledgee of goods cannot separate them from the debt and sell his interest in them, without losing his security; and as he cannot safely sell his interest, it is difficult to find a sound reason for a practice allowing a sale of his interest on an execution against him. The better practice would be, it seems, to reach his interest in the debt by proceedings supplementary to the execution, as you reach any other mere chose in action, treating the things held in pledge as they are, a mere incident to the debt.⁵

Without having the rightful power to sell or to again pledge the goods held as a security separate from the debt secured, the pledgee may pass them over to another party to be held for his benefit;⁶ or he may transfer them with the debt as a security for his own liability; but may not

Weaver v. Danby, 42 Barb. 411, a manufacturer of timber furnished with funds to purchase, and entitled to receive so much a foot on delivery, was held to have an interest in the lumber liable to sale on execution. The purchaser under a contract for real estate has no such interest. *Griffin v. Spencer*, 6 Hill, 525; 5 Selden, 45; and see *Herring v. Hoppock*, 15 N. Y. 409.

¹ *Merritt v. Bartholick*, 36 N. Y. 44.

² *Ante*, § 185.

³ *Badlam v. Tucker*, 1 Pick. 399; *Champlin v. Johnson*, 39 Barb. 606. The interest of the mortgagor, the conditions of the mortgage being unbroken, may be sold. *Hamill v. Gillespie*, 48 N. Y. 556. The interest of a judgment debtor in personal property lawfully pledged for the payment of money or the performance of a contract or agreement, may be sold in the hands of the pledgee by virtue of an execution against property. See Code of Civil Pro. § 1412.

⁴ *McCombie v. Davies*, 7 East, 5; *Daubigny v. Duval*, 6 T. R. 604.

⁵ *Ingalls v. Lord*, 1 Cowen, 240; *Ransom v. Miner*, 3 Sandf. 692; *Hasbrouck v. Bouton*, 60 Barb. 413; 41 How. Pr. 208.

⁶ This is often done. *White v. Platt*, 5 Denio, 269; *Hays v. Riddle*, 1 Sandf. 248; *Hutton v. Arnett*, 51 Ill. 198; *Nash v. Mosher*, 19 Wend. 431; *Yates County Nat. Bank v. Baldwin*, 43 Hun, 136.

make any disposition of the pledge that will defeat or impair the original pledgor's right to take back his goods on payment of his debt.¹ He cannot sell or pledge them as his own property, without losing his security.²

§ 200. An actual delivery or something equivalent is essential to complete the contract of pledge: hence, while a strict technical pledge cannot be made of goods yet to be manufactured, an agreement hypothecating them as a security, will take effect as a pledge, as fast as they are made.³ Like an assignment of moneys to be earned or of demands that are yet to come into existence, the transfer takes effect upon them as they come into being.⁴ Though there cannot be a present grant of an interest which may or may not accrue, there may be a pledge or an assignment made of any interest in personal property.⁵ And it seems that even the naked possibility or expectancy of an heir to his father's estate may be secured to a transferee by an executory contract, made in good faith, and for a valuable consideration; and that the agreement will be enforced in equity.⁶ Though liable to be defeated, it is capable of being alienated;⁷ and upon principle there appears to be no legal reason to prevent a man from binding himself by an executory agreement to take effect and operate upon his personal estate at a future time. The law works out the same thing in substance, where he contracts a debt to be paid at any time after date; it is collectible out of his property, when it falls due.

§ 201. The pledgee or lienholder may make any disposition of the things held in pledge or subject to his lien, consistent with the duty he

¹ *Lewis v. Mott*, 36 N. Y. 395; *Chapman v. Brooks*, 31 N. Y. 75; *Jarvis v. Rogers*, 15 Mass. 389, 408; *Mann v. Shiffner*, 2 East, 533; *McCombie v. Davies*, 7 East, 6; *Moses v. Conham*, Owen, 123; *Haskins v. Kelly*, 1 Robt. 160; *Nash v. Mosher*, 19 Wend. 431; *Gallaher v. Cohen*, 1 Brown Pa. 43; *Lawrence v. Maxwell*, 53 N. Y. 19.

² *Dykers v. Allen*, 7 Hill, 497. The effect of a wrongful pledge upon relative rights will depend upon the relation of the parties. *Douglas v. Dudley*, 48 N. Y. 688. See *Butts v. Burnett*, 6 Abbott's Pr. N. S. 302; *New York, L. E. & W. R. R. Co. v. Davies*, 38 Hun, 477.

³ *Macomber v. Parker*, 14 Pick. 497. A pledge ineffectual for want of delivery may be validated by subsequent delivery. *Parshall v. Eggart*, 54 N. Y. 18; *Macauley v. Hopkins*, 35 Hun, 556.

⁴ *Field v. Mayor, etc., of New York*, 6 N. Y. (2 Seld.) 179.

⁵ *Lawrence v. Bayard*, 7 Paige Ch. 70.

⁶ *Stover v. Eycleshimer*, 46 Barb. 84; 3 Keyes, 620.

⁷ *Moore v. Littel*, 41 N. Y. 66. This case relates to estates in land; it holds that a grant "to A for life, and after his decease to his heirs and their assigns forever," gives to A's children a vested interest in the land, and that the interest of each is alienable immediately, though capable of being increased or lessened, or totally defeated.

owes to the owner or pledgor; he may transfer the possession subject to his lien to a third person to hold until the lien is paid; and he may make a sub-pledge of his demand with the goods, subject to the interest of the original pledgor. But he cannot safely make any use or disposition of the things pledged inconsistent with the obligation he is under to the owner or pledgor.¹

§ 202. III. *Subject of Pledge.* The contract of pledge in its earliest use was confined to goods and chattels—things capable of an actual or manual delivery. The early cases relate almost uniformly to the simplest forms of property—chattels, plate, jewels, watches, wearing apparel, articles of furniture, all that peculiar assortment of things deposited under the stress of necessity in a pawnbroker's shop. The preamble to the earliest English statute on the subject, describing the business and the abuses to be reformed, does not allude to a pawn or pledge of anything but tangible property;² and while from the earliest times we find the contract in use, it is noticeable that the transaction usually concerns things capable of being actually delivered or deposited.³ By degrees the contract has been extended in its application until it is now used to cover any kind of personal property; an extension that might have been anticipated from the development of the law, from the manner in which diverse rights of property spring up from the growth of

¹ *Duncomb v. New York, etc., R. R. Co.*, 84 N. Y. 190, 208; *Lawrence v. Maxwell*, 53 N. Y. 19; *Nash v. Mosher*, 19 Wend. 431; *Samuel v. Morris*, 6 Carr. & Payne, 620; *Mount v. Williams*, 11 Wend. 77; *Baltimore, etc., Ins. Co. v. Dalrymple*, 25 Md. 269. See also *Moore v. Hitchcock*, 4 Wend. 292, where the lienholder, the maker of brick, was held entitled to maintain *trover* against the Sheriff for levying upon and selling the property in disregard of his rights, on an execution against the general owner. See *G Hill*, 484; 1 N. Y. 20; 11 N. Y. 501, 507; 25 N. Y. 348; 28 do. 574.

² *I. Jac. I. Ch. 21.* See also, 25 Geo. III. Ch. 48.

³ Reference is here made to the first reported cases under the common law. In a translation of *Gentoo Laws*, made at the instance of Warren Hastings, from the Sanscrit into the Persian, and from the Persian into the English language, laws of a very ancient form and origin, we find a chapter entitled *Of Lending and Borrowing*, divided into sections: 1, of interest; 2, of pledges, etc. And the contract is assumed to be a *deposit of some article as a security*. An extract or two will show this, and also the remarkable similarity in some of its particulars between ours and the most ancient law: "If a man borrows money upon a deposited pledge, the son of his grandson must discharge the debt." It does not outlaw. "If a man, who hath long since deposited a pledge, should abscond or die, the creditor in the presence of the debtor's friends shall produce the pledge, and ascertain its value; after that he shall keep it by him ten days; and if within that space the debtor's heir does not come in and satisfy his claim, he shall sell the article pledged, and take his own money, with interest, from the amount; if there be any remainder the creditor is not to keep it." The instances of pledge found in the Mosaic law relate entirely to things movable, and actually delivered.—*Exodus*, xxii. 26, 27; *Deut.* xxix. 6, 12, 13, 17.

commerce, from the employment of capital by corporate bodies, and from the vast increase in the volume and variety of personal property in modern times, as compared with the earlier stages of society.

§ 203. The rule that every kind of personal property may be pledged has with us one exception; a pension certificate cannot be pledged or mortgaged;¹ nor can any right or interest in any pension be pledged or mortgaged. The general government has taken care from the beginning that its pensioners shall receive and enjoy all pension moneys for the support of themselves and their families. Substantially the same provisions are found in all the statutes on the subject.² The pension cannot be alienated, nor can the money due or to become due to any pensioner be attached, levied upon, or seized under any legal or equitable process: the intention of the statute is that the pension shall enure to the pensioner as a livelihood.

The policy of these acts of Congress is the same as that which underlies our exemption laws; under which the protection and preservation of the family, the primary community, against the improvidence or misfortune of its head, are deemed so important as to justify a limitation upon the right to dispose of property; and under which a stipulation waiving in advance the protection of the statute is held void, because designed to disappoint the intentions of the legislature.³ Upon

¹ *Payne v. Woodhull*, 6 Duer, 169; *Moffatt v. Van Doren*, 4 Bosw. 609.

² The Pension Laws of the United States, as revised and consolidated June 22, 1874, contain these two sections; title 57. "§ 4745. *Any pledge, mortgage, sale, assignment or transfer of any right, claim or interest in any pension which has been, or may hereafter be granted, shall be void and of no effect; and any person acting as attorney to receive and receipt for money, for and in behalf of any person entitled to a pension, shall, before receiving such money, take and subscribe an oath, to be filed with the pension agent, and by him to be transmitted, with the vouchers now required by law, to the proper accounting office of the Treasury, that he has no interest in such money by any pledge, mortgage, sale, assignment or transfer, and that he does not know or believe that the same has been so disposed of to any person.*" § 4746 provides a punishment for procuring or presenting false vouchers, etc. "§ 4747. No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or is in the course of transmission to the pensioner entitled thereto, but shall enure wholly to the benefit of such pensioner." See also, the exemptions provided for by § 1303 of the Code of Civil Procedure. *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550; *Burgett v. Fancher*, 35 Hun, 647; *Stockwell v. Bank of Malone*, 36 Hun, 583.

³ *Kneettle v. Newcomb*, 22 N. Y. 249; the waiver of the exemption given by statute at the time the debt was contracted was held void. *Crawford v. Lockwood*, 9 How. Pr. 547; *Recht v. Kelly*, 82 Ill. 147; *Phelps v. Phelps*, 72 Ill. 545; *Curtiss v. O'Brien*, 20 Iowa, 376; *Maxwell v. Reed*, 7 Wis. 583. See comment upon the rule in *Shapley v. Abbot*, 42 N. Y. 443, 451; and in *Wilcox v. Hawley*, 31 N. Y. 648, 653. The like policy, founded in motives of humanity, prevailed at a very early day. For example,

views of policy and humanity the householder having a family is not permitted to divest himself of the protection of the law; and the pensioner is not allowed to anticipate his living. But so far as his means will permit, every man is bound to pay his debts; and there is no law to prevent him from paying his debt with money derived from any source, or from depositing exempt property as a pledge for its payment.¹

§ 204. Independent of the statute, a pension given for past services, whether it be regarded as an indefeasible right, or as an allowance payable during the pleasure of the government, is an assignable interest; it is quite distinguishable from the compensation presently accruing to officers and soldiers for their services. The effect of an assignment by an officer of his pay or salary yet to be earned would be prejudicial to the public service; it is therefore against the policy of the law to hold it assignable.² The half pay granted to an officer, contemplating a possible recall to service at a future day, is treated in the same way as his pay for present services.³ The public has an interest in his life, and is concerned in his reasonable support; on this ground the statute law often interposes to prevent the sale or assignment or pledge of a pension.⁴

in the Mosaic law no one was permitted "to take a widow's raiment to pledge." * * "No man shall take the nether or the upper millstone to pledge: for he taketh a man's life to pledge." * * "When thou dost lend thy brother anything, thou shalt not go into his house to fetch his pledge; thou shalt stand abroad, and the man to whom thou dost lend shall bring out the pledge abroad unto thee; and if the man be poor thou shalt not sleep with his pledge. In any case thou shalt deliver him the pledge again when the sun goeth down, that he may sleep in his own raiment, and bless thee; and it shall be righteousness unto thee before the Lord thy God."—*Deut.* xxvi. 6, 10-13.

¹ *Frost v. Shaw*, 3 Ohio St. 270. Exempt property may be transferred as security for an indebtedness even after a levy thereon. *Bishop v. Johnson*, 15 State Rep. 579; and see *Livor v. Orser*, 5 Duer, 501. To the rule that exempt property may be the subject of a valid pledge there is one statutory exception. A pledge of exempt property as security for a debt contracted for the purchase of intoxicating liquors is void. *Laws of 1842*, Chap. 157, § 3. No pawn can be taken of any Indian within this State for any spirituous liquor. *Laws of 1813*, Chap. 29, § 5; *Laws of 1849*, Chap. 420, § 2. And it is also made unlawful for any white person under any pretense, or on any account whatever, to receive from an Indian of certain tribes any article or articles whatever by way of pawn or pledge. *Laws of 1817*, Chap. 143, § 1.

² *Bliss v. Lawrence*, 58 N. Y. 442, and cases there cited; *Wells v. Foster*, 8 Mees. and Wels. 149; *Field v. Chipley*, 79 Ky. 269; *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478; *Billings v. O'Brien*, 4 Daly, 556; *Beal v. McVicker*, 8 Mo. App. 202; *Bangs v. Dunn*, 66 Cal. 72; *Hill v. Paul*, 8 Cl. & Fin. 295; *Cooper v. Reilly*, 2 Sim. 560. See *Thurston v. Fairman*, 9 Hun, 584.

³ *Flarity v. Odum*, 3 T. R. 681; *Lidderdale v. Duke of Montrose*, 4 T. R. 248; *Stone v. Lidderdale*, 2 Anstr. 533.

⁴ *Ex parte Batline*, L. L. D. 4 Adol. and Ellis, 690; *Priddy v. Rose*, 3 Merrivale, 85,

§ 205. It was formerly doubted whether incorporeal things, like debts and scrip of stock, which cannot be manually delivered, could be the proper subjects of a pledge—a doubt no longer, and now of no interest except as it indicates the order in the growth of the law. For it is at length perfectly settled that any legal or equitable interest whatever in personal property may be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available for the satisfaction of his debt. Shares of stock can be so transferred by an instrument in writing, and thus made a collateral security for the payment of borrowed money.¹ A negotiable note or bond may be so transferred by a simple delivery; being payable to bearer, or to order and properly indorsed, a delivery places them in the power of the transferee.²

§ 206. The distinction between a mortgage and a pledge of personal property is perfectly settled; under a pledge the title does not pass, it remains in the pledgor; under a mortgage the title passes, subject to a condition of defeasance. Plain as this distinction is, it requires some discrimination to draw the line between a mortgage and a pledge of choses in action, there being in each case a formal transfer of the property. When the transfer is made as a mere security for a debt, it is always a pledge; if the transfer be made in terms to secure the payment of moneys due, or if that be the fair interpretation of the transfer, it creates a pledge.³ A written transfer of goods or chattels is interpreted on the same principle; it creates a pledge, where that appears to be the intention of the parties; and the circumstance that the value of the goods exceeds the amount of the debt tends to show the intention of the transfer.⁴

§ 207. There is a contract in use in Louisiana known as an *anticresis*;

102; *Row v. Dawson*, 1 Ves. 331; *Davis v. Duke of Marlborough*, 1 Swan, 79; *Grenfell v. Dean and Canons of Windsor*, 2 Beaven R. 544.

¹ *Wilson v. Little*, 2 Comst. (2 N. Y.) 443, 445; S. C. 1 Sand. R. 351; *Romaine v. Van Allen*, 26 N. Y. 309; 41 N. Y. 235, 241; *Morris Canal & Banking Co. v. Fisher*, 1 Stockt. R. 667.

² *Hays v. Riddle*, 1 Sandf. R. 248; *Bank of the State of N. Y. v. Vanderhorst*, 1 Robt. R. 211, holding that the pledgee receiving a note on a discount or loan is a *bona fide* holder for value; S. C. 32 N. Y. 553.

³ *McLean v. Walker*, 10 John. R. 472, 474; *Garlick v. James*, 12 John. R. 146, 149; *Brownell v. Hawkins*, 4 Barb. 491; *Clark v. Henry*, 2 Cowen. 324; *Parsons v. Overmire*, 22 Ill. 58; *Campbell v. Parker*, 9 Bosw. 322; *Kimball v. Hildreth*, 8 Allen (Mass.), 167; *Gay v. Moss*, 34 Cal. 125; *Haskins v. Kelly*, 1 Robt. 160, 172; *Woodworth v. Morris*, 56 Barb. 97; *Mowry v. Wood*, 12 Wis. R. 413.

⁴ *Bright v. Wagle*, 3 Dana (Ky.), 252; *Houser v. Kemp*, 3 Pa. St. 208; *Marshall v. Williams*, 2 Hayw. (N. C.) 405. See *Barrow v. Paxton*, 5 John. R. 258, and *Brown v. Bement*, 8 John. R. 96, where a bill of sale was held a mortgage.

it is a pledge of immovable property, possessing some of the features of a mortgage; it is a conveyance of real estate, with a counter letter or stipulation by the grantee to reconvey on payment of the money loaned; it gives the lender, the grantee, possession of the premises, with the income or fruits arising from the property; out of the income the grantee is to pay the taxes and repairs and interest and to apply the balance on the principal. The grantor's rights remain unimpaired, until they are cut off by a sale under sentence of a court.¹ The instrument resembles one form of the mortgage, formerly in use under the common law, namely, the *vivum vadium* or living pledge, under which the mortgagee took and held possession until the money loaned was paid out of the rents and profits of the property²—a form of security now unused, because unsuited to our modern habits.³

§ 208. The common law does not enforce a contract of hypothecation, distinct from a pledge or mortgage of goods or chattels; certainly it does not allow, as against creditors and third parties, the creation of secret verbal liens, where the lienholder does not have or retain possession of the property.⁴ The hypothecation of a ship or cargo is permitted upon reasons that do not affect ordinary dealings with

¹ Code of Louisiana, Arts. 3102, 3143-3148; *Livingston v. Story*, 11 Peters, 351, 388.

² 2 Black. Comm. 157. Ante, §§ 177, 178, 187.

³ In *Roberts v. Sykes*, 30 Barb. 173, 179, the court did not feel authorized to presume a pledge to have been made on an agreement that the pledgee was to hold until paid out of the income from the pledge.

⁴ *Howes v. Ball*, 7 Barn. & Cress. 481; 14 Eng. Com. Law, 218. A agreed to give B, a coachmaker, 100*l.* for a coach, and to pay for the same by four bills of 25*l.* each; and that B should have a claim upon the coach until the debt was duly paid. TENTERDEN, C. J.: "The transaction amounted to a sale of the coach, so as to transfer the property. That being so, the question is, whether after such a transfer of the property, the seller can have any valid claim on the property so transferred. Hypothecation is not allowed by the law of England, although in some parts of the Continent, not many years ago, it was allowed." The stipulation was therefore treated as a mere license, valid only as between the two parties to the contract. See *Wait v. Greene*, 36 N. Y. 556, distinguished from cases of conditional sales in *Ballard v. Burgett*, 40 N. Y. 314, and in *Austin v. Dye*, 46 N. Y. 500. A lien is a different thing entirely; it is a right to hold or detain property: *McCaffrey v. Wooden*, 62 Barb. 316; given back on a purchase of goods, in writing, it is a chattel mortgage. *Dunning v. Stearns*, 9 Barb. 630. A mortgage of a crop yet to be planted, made by the owner of the land, is held valid in some of the States. *Watkins v. Wyatt*, 9 Baxter, 250; *Headrick v. Braltain*, 63 Ind. 483; *Rawlings v. Hunt*, 90 N. C. 270; *Harris v. Jones*, 83 N. C. 317; *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193; *Ambuehl v. Matthews*, 41 Minn. 537; *Taylor v. Hodges*, 105 N. C. 344; *Norris v. Hix*, 74 Iowa, 524. See *Cressey v. Sabre*, 17 Hun, 120; *McCaffrey v. Wooden*, 65 N. Y. 459. The owner of the land has a right to contract for its cultivation, and may in advance fix the title to the produce by agreement. *Andrews v. Newcomb*, 32 N. Y. 417.

personal property.¹ The spirit and even the very letter of our statute law holds every assignment of goods or chattels, by way of security, void as against creditors; and upholds the mortgage of chattels only when it is properly filed, and is really and fairly given as a security; and never when it is given merely as a cover and for the benefit of the mortgagor.² The lien having been once created in good faith by a delivery of the chattels, it will not be defeated by the lienholder's permitting them to be used by the owner for a temporary purpose.³

§ 209. *Mode of making a Pledge.* Goods and chattels may be pledged by delivering them to a creditor, as collateral security for the payment of the debt due to him. An actual delivery completes the contract.⁴ When the terms of the agreement are reduced to writing, it is for the court to determine their legal effect; they create a pledge when they deliver or give over the property as security for the debt, expressly or impliedly reserving a right to redeem;⁵ and they create a mortgage when they transfer the general title, subject to a defeasance.⁶ There is often, as we have noticed, but little real difference between a contract which the law declares a pledge, and one which it adjudges a chattel mortgage; but this difference is highly important, on account of the difference in the legal rights and remedies arising under them.

A verbal pledge, accompanied by a delivery of chattels, is valid; and the contract is to be proved by verbal testimony, showing the actual transaction.⁷ Words alone will be sufficient to create a pledge, where the intention is clear and the goods are already in the pledgee's possession;⁸ as a gift may be consummated by mere words, where the subject of it is already in the donee's possession.⁹ The mode of the delivery is not at all important, it may be made directly to the pledgee, or to a

¹ *Fontaine v. Col. Ins. Co.*, 9 John. R. 29.

² *Edgell v. Hart*, 9 N. Y. (5 Seld.) 213; *Ford v. Williams*, 24 N. Y. 359; *Southard v. Benner*, 72 N. Y. 424; *Brackett v. Harvey*, 91 N. Y. 214.

³ *Hall v. Tuttle*, 8 Wend. 381; *Ferguson v. Union Furnace Co.*, 9 Wend. 345. See *Allen v. Spencer*, 1 Edm. 317.

⁴ *Stearns v. Marsh*, 4 Denio, 227.

⁵ *McLean v. Walker*, 10 John. R. 471, 474; *Brownell v. Hawkins*, 4 Barb. 491. See *Parshall v. Eggart*, 52 Barb. 367; S. C. 54 N. Y. 18; *Bright v. Wagle*, 3 Dana (Ky.), 252; *Heyde v. Nick*, 5 Leigh (Va.), 336.

⁶ *Bunacleggh v. Poolman*, 3 Daly, 236; *Langdon v. Bush*, 9 Wend. 80; these are border cases; they resemble a mortgage more than a pledge; *Dunning v. Stearns*, 9 Barb. 630.

⁷ *Parsons v. Overmire*, 22 Ill. 58; *Milliken v. Dehon*, 27 N. Y. 365. So in respect to chattel mortgages. *Hall v. Tuttle*, 8 Wend. 375; *Ferguson v. Union F. Co.*, 9 Wend. 345.

⁸ *Brown v. Warren*, 43 N. H. 430.

⁹ *Lydia Allen v. Cowan*, 23 N. Y. 502.

third person to hold for him.¹ And in the case of heavy and cumbersome articles, like logs lying in a boom, the delivery may be made without moving them.² The actual custody of the goods need not in all cases be transferred to the pledgee; it is not always necessary in a sale, in order to transfer the title; and it is quite evident that a delivery sufficient to pass the title under a contract of sale must be sufficient to create a valid contract of pledge.³ A subsequent delivery, following a contract of sale or pledge, will render it valid.⁴

§ 210. The situation of goods or chattels can rarely be such as to prevent the owner from pledging them. The goods being stored in a warehouse, the delivery may be made by a written transfer, on the warehouseman's agreement to hold the property subject to the order of the transferee;⁵ and when the goods are in transit in the hands of a carrier, the delivery may be made by a transfer of the bill of lading.⁶ The delivery is accomplished in these cases, by transferring to the pledgee the means with the right to take the actual possession of the goods.

The owner of goods, by permitting them to be shipped in the name of another person, arms that person with the power to dispose of the goods; he enables him to take the bill of lading in his own name; he invests him with written evidence of title to the property; and the law protects a third party taking them in good faith as a pledge or security for an advance upon them.⁷ The effect is the same where the owner

¹ Sumner v. Hamlet, 12 Pick. (Mass.) 76. See Macauley v. Hopkins, 35 Hun, 556.

² Jewett v. Warren, 12 Mass. 300; Ridder v. McKnight, 13 John. R. 294.

³ Hankins v. Baker, 46 N. Y. 666; Winne v. McDonald, 5 Bosw. 130; 39 N. Y. 233.

⁴ Parshall v. Eggart, 54 N. Y. 18.

⁵ Pierce v. Gibson, 2 Ind. 408; Gibson v. Stevens, 8 How. U. S. 384; Griswold v. Havens, 25 N. Y. 595; Whitney v. Tibbits, 17 Wis. 359; Cartwright v. Wilmerding, 24 N. Y. 521. Goods may be pledged by a mere delivery of a warehouse receipt without indorsement. St. Louis Bank v. Ross, 9 Mo. App. 399. The delivery and indorsement of a warehouse receipt is a symbolical or constructive delivery of the goods. Willets v. Hatch, 132 N. Y. 41, 44.

⁶ Edwards on Factors and Brokers, §§ 41, 50; Durbrow v. McDonald, 5 Bosw. 130; 39 N. Y. 233; 24 N. Y. 521; Harris v. Birch, 9 Mees. & Wels. 591; Brent v. Miller, 81 Ala. 309; Douglass v. People's Bank, 86 Ky. 176; Commercial Bank v. Pfeiffer, 108 N. Y. 242; First Nat. Bank v. Kelly, 57 N. Y. 34. The rule is well settled that property or goods shipped by a bill of lading drawn to order may be transferred by delivery of the bill to a third person without any indorsement. Bank of Rochester v. Jones, 4 N. Y. 497, 507; City Bank v. Rome, W. & O. R. R. Co., 44 N. Y. 136; Merchants' Bank v. Union R. R. & Transp. Co., 69 N. Y. 373.

⁷ See 4 Geo. IV. Ch. 83; 6 Geo. IV. Ch. 94; 5 and 6 Vict. Ch. 39; and 3 R. S. of N. Y. 7th ed. 2257; Laws of 1830, Chap. 179; also 4 N. Y. Statutes at Large, 461. The first section of the New York statute enacts that, "Every person in whose name any merchandise shall be shipped, shall be deemed the true owner thereof, so far as

sells goods, and allows the purchaser to ship them in his own name, before the price is paid.¹ Fraud in the shipper's purchase of the goods, sufficient to annul the contract as against him, will not, it seems, defeat the party making advances on the strength of the title;² but where the bill of lading is fabricated or procured on stolen receipts, it amounts to nothing as a security for advances; it is but an item of evidence to establish a felony.³

§ 211. The factor's act, as we have said, specifies three instruments as documentary evidence of title to goods, upon which third parties may safely act in making advances upon the property; namely, a bill of lading, a custom-house permit, and a warehouse keeper's receipt.⁴ The bill of lading is the carrier's contract; it states on whose account and risk the goods are shipped, and this statement is evidence that the person so named is the real owner; as shipper he may transfer the bill, and with it the goods which it represents; or he can pledge the property by a simple delivery of the bill, as security for the payment of a draft drawn on the consignee. The carrier delivers on production of the bill of lading, and where the shipper indorses upon it an order to deliver to the consignee on payment of the annexed draft, he can only receive the goods on making the payment thus called for.⁵ The delivery of the bill, as collateral security on the discount of the draft, is more than a pledge; it is a transfer of the title to the cargo, in trust to sell it and use the proceeds to pay the draft.

Duly issued on a shipment of goods, the bill of lading represents the property; and a transfer of it has the same legal effect as a transfer of

to entitle the consignee to a lien thereon: 1. For any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment shall have been made; and 2. For any money or negotiable security received by the person in whose name such shipment shall have been made, to or for the use of such consignee." See *Dows v. Rush*, 28 Barb. 157; *S. C.* 16 N. Y. 325; 24 N. Y. 638; *Blossom v. Champion*, 28 Barb. 217; *Keyser v. Harbeck*, 3 Duer, 373. The title cannot pass under a felony. *Florence Sewing Machine Co. v. Warferd*, 1 Sweeney, 433. See *Armour v. M. C. R. R. Co.*, 65 N. Y. 111.

¹ *Winne v. McDonald*, 39 N. Y. 233; *Smith v. Lynes*, 5 N. Y. 44; *Parker v. Baxter*, 86 N. Y. 586.

² An honest purchaser for value from the fraudulent vendee acquires a good title; on this principle a pledgee for present advances is entitled to protection. *Durbrow v. McDonald*, 5 Bosw. 130; *Williams v. Lilt*, 36 N. Y. 319; *Barnard v. Campbell*, 58 N. Y. 73. See *Adams v. Bowerman*, 109 N. Y. 23.

³ *Brower v. Peabody*, 13 N. Y. 121; *The Schooner Freeman v. Buckingham*, 18 How. U. S. 182; *Grant v. Norway*, 10 Com. B. 665; *Saltus v. Everett*, 20 Wend. 267; *Bassett v. Spofford*, 45 N. Y. 387. See *Marine Bank of Buffalo v. Fiske*, 71 N. Y. 333.

⁴ See § 3 of the N. Y. Factors' Act, above cited.

⁵ *Bank of Rochester v. Jones*, 4 N. Y. 497; *The City Bank v. Rome, W & O. R. R. Co.*, 44 N. Y. 136; *Pettitt v. First, etc., Bank*, 4 Bush (Ky.), 334; post, § 620.

the property. Hence, when the bill requires the carrier, as it often does, to deliver the goods at the end of the voyage to the bearer, or to the order of the shipper, or to his assigns, it declares on its face the shipper's right of property and control over the goods; ¹ and it is daily used by him in mercantile transactions as a collateral security for advances.² The shipper, being the owner, has control of the property; until he parts with the bill of lading, he has the constructive or legal possession, and the right to the immediate actual possession; and the law allows him to pledge or dispose of the goods, subject only to the right of the carrier to compensation for his services.

§ 212. The shipper has the power to deal with the goods as his own; he may therefore revoke a consignment after the bill of lading has been signed, or he may draw on the consignee and transfer the bill to secure the payment of the draft, and thus render the consignment conditional upon the acceptance or payment of the draft. He may do this, even where he is under an agreement to ship the goods to the consignee on account of prior advances; the agreement does not bind the goods.³

When the bill of lading is made payable to order, the party in possession of the bill duly endorsed is entitled to receive the goods; he is the person entrusted with the evidence of title, and the proper party to enter the goods at the custom-house.⁴ Holding the title in this manner, he can obtain advances on the goods; assuming that the bill has been duly transferred to him.⁵ Not being negotiable like a bill of exchange, the bare custody of the bill (of lading) is not conclusive evidence of title; and, therefore, a misappropriation of the bill by a clerk will not deprive the owner of his right of property.⁶ The intention of the statute is to protect third persons dealing honestly with the consignee, entrusted with the title.⁷ Making advances in bad faith, or with knowledge of the facts, or under circumstances of suspicion, will not entitle

¹ *Hailles v. Smith*, 1 Bos. & Pull. 563; *Nathans v. Giles*, 5 Taunt. 588; *Allen v. Williams*, 12 Pick. 297.

² *Craig v. Sibbert & Jones*, 15 Penn. St. 238; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Lanfear v. Blossman*, 1 La. Ann. R. 148.

³ *Cayuga Co. National Bank v. Daniels*, 47 N. Y. 631; *Marine Bank of Chicago v. Wright*, 46 Barb. 45; *Hauterman v. Bock*, 1 Daly, 366.

⁴ *Bruce's Warehouse Manual*, 17. That property or goods shipped by a bill of lading drawn to order may be transferred by delivery of the bill to a third person without any indorsement, see *Bank of Rochester v. Jones*, 4 N. Y. 497, 507; *City Bank v. Rome, W. & O. R. R. Co.*, 44 N. Y. 136; *Merchants' Bank v. Union R. R. & Transp. Co.*, 69 N. Y. 373.

⁵ *Lickbarrow v. Mason*, 2 T. R. 63; 5 T. R. 367, 683; post, § 629.

⁶ *Gurney v. Behrend*, 3 Ellis & Black. 622; *Zachrisson v. Ahman*, 2 Sand. 68; *Com. Bank of Rochester v. Cole*, 15 Barb. 506; *Covill v. Hill*, 4 Denio, 323.

⁷ *Porter v. Parks*, 49 N. Y. 564.

the pledgee to hold the goods; it will not enable him to acquire any greater interest in them than the pledgor possessed.¹

§ 213. The consignee in possession of the bill of lading is presumed to be the owner of the goods; as a matter of evidence, the legal presumption is that he is the true owner, where the goods are placed at his sole disposal.² Between the parties this presumption of fact may be overcome by proof, showing the actual title to the property; as that it was consigned for sale, under instructions binding the consignee as soon as he accepts the goods.³ The same proof may be given in favor of the consignor's creditors, with a view to reach his interest in the property—an interest that may be attached subject to the consignee's lien for advances.⁴

§ 214. It is to be kept in mind that the factor or commission merchant cannot at common law legally pledge the goods of his principal, without express authority; that he cannot do so, even for the purpose of raising money to meet his principal's bills of exchange, drawn against a consignment of the goods.⁵ It follows that a factor's pledge of the goods under his control, however made, is ineffectual unless covered by the express terms of the statute.⁶ The third section of the New York statute applies only where the factor or agent is intrusted with the evidence of title, or with the possession of merchandise, for the purpose of sale, or as security for advances, or both. It does not apply where goods are stored with or left in the possession of the factor, without authority to sell; or where the goods are committed to his custody for the purpose of shipment or transportation.⁷

¹ *Commercial Bank of Rochester v. Cole*, 15 Barb. 506; *Easton v. Clark*, 35 N. Y. 225. See *Farmers & M. Nat. Bank v. Erie R. Co.*, 72 N. Y. 188; *Dorrance v. Dean*, 106 N. Y. 203. ² *Angell on Com. Carriers*, § 497; *Sweet v. Barney*, 23 N. Y. 335.

³ *Winter v. Coit*, 7 N. Y. 288; *Du Peirat v. Wolfe*, 29 N. Y. 436.

⁴ *Patterson v. Perry*, 5 Bosw. 518; *Curtis v. Norris*, 8 Pick. 280; *Black v. Zacherie & Co.*, 3 How. U. S. 483.

⁵ *Gill v. Kymer*, 5 Moore, 503; *Fielding v. Kymer*, 2 B. & B. 639; *Newsom v. Thornton*, 6 East, 17; *Guichard v. Morgan*, 4 Moore, 36; *Martine v. Coles*, 1 M. & S. 140; *McCombie v. Davies*, 7 East, 5; 3 Smith, 3. See *Boyson v. Coles*, 6 M. & S. 14; *First Nat. Bank of Toledo v. Shaw*, 64 N. Y. 283, 298.

⁶ *Hatfield v. Phillips*, 12 C. & F. 343; 14 M. & W. 665; *Phillips v. Huth*, 6 M. & W. 572.

⁷ *Bonito v. Mosquera*, 2 Bosw. 402, 429, 436; *Wilson v. Nason*, 4 Bosw. 155; *Covill v. Hill*, 6 N. Y. 374; *Cook v. Adams*, 1 Bosw. 497; *Danbury v. Britton*, 5 Scott, 665. See *Moore v. Kidder*, 34 Hun, 534; S. C. 106 N. Y. 32. The English Act of 6 Geo. IV. Ch. 94, as construed by the decisions, only rendered pledges effectual when made on the specific document of title entrusted to the factor by the owner. The later Act of 5 and 6 Vict. Ch. 39, is of broader scope; but does not cover pledges for antecedent debts, no actual advance being made at the time. *Macnee v. Gorst*, 4 L. R. Eq. 351; 15 W. R. 1197. The New York Factors' Act, with some modifications, is a reproduction of that of 6 George IV. *First Nat. Bank of Toledo v. Shaw*, 64 N. Y. 283, 298.

§ 215. As soon as the consignee receives the goods, the bill of lading ceases to represent them ; it has accomplished the purpose for which it was given ; and it can no longer be transferred as evidence of the title to the goods.¹ On their arrival from abroad, the consignee holding the bill of lading enters them at the custom-house, and procures from the collector and naval officer of the port a permit to land the goods, which is given on receipt of security for or on payment of the duties. On presenting this permit to the inspector, the goods are landed and delivered. A delivery order indorsed on the permit will give to the holder, exclusively, the means and power of obtaining possession of the property.² It may, therefore, be assumed that the consignee may pledge the goods for advances by a transfer of the custom-house permit, with an order for their delivery to the transferee.³

§ 216. When the duties are not paid, the goods pass into a bonded warehouse, designated by the consignee ; and the warehouseman gives a receipt for them, stating on whose account they are so received in bond. This receipt now becomes evidence of the title ; the goods are held as security for the payment of the duties ; the actual custody of the property being separated from the legal possession. In this situation the holder of the receipt, the consignee or factor for sale, may pledge the goods for advances or sell them, by a transfer with an order indorsed upon the receipt for a delivery of the goods, accompanied by a written authority to make the withdrawal entry at the custom-house. Thus armed, the transferee has the exclusive means of reducing the goods into his actual possession, on payment of the duties. The legal possession accompanies the title, and passes to the transferee.⁴

The money or securities advanced by the pledgee must be given on the faith of the title ; but it is not essential that the pledge should be created in specific form, at the very time the advance is made ; it may be perfected afterwards ; or the pledge may be first made, and the money or security afterwards given.⁵

§ 217. Goods or grain in a private warehouse, for which the owner

¹ *Bonito v. Mosquera*, 2 Bosw. 401, 440; *Hatfield v. Phillips*, and *Phillips v. Huth*, *supra*.

² *Bonito v. Mosquera*, 2 Bosw. 441, and *Bruce's Warehouse Manual*.

³ The force of the permit is soon spent ; it is a voucher for the duties paid ; it authorizes a landing of the goods ; and it specifies the importer or consignee by name.

⁴ *Mottram v. Heyer*, 5 Denio, 629; *Waldron v. Romaine*, 22 N. Y. 368; *Dunham v. Mann*, 8 N. Y. 508; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Zachrisson v. Poppe*, 3 Bosw. 171.

⁵ *Jennings v. Merrill*, 20 Wend. 9; *Winne v. McDonald*, 39 N. Y. 233; *Cartwright v. Wilmerding*, 24 N. Y. 521, 533. See *Voorhis v. Olmstead*, 66 N. Y. 113; *Knights v. Wiffin*, L. R. 5 Q. B. 660; *Continental N. Bk. v. Nat. Bk.*, 50 N. Y. 575.

holds a receipt, may be delivered in pledge by a transfer, with an order for the property; the receipt is written evidence of title within the meaning of the statute; and a valid transfer of the goods, accompanied with an order on the warehouseman for their delivery, is effectual to render valid a contract of pledge. The delivery is sufficient. The transferee takes the title in trust, and the possession follows the title; certainly, where the transaction covers a specific parcel of goods.¹ In what manner is this transfer to be made? As a bill of lading may be transferred, with the goods covered by it, by a simple delivery of it in pledge, there does not seem to be any good reason to prevent a valid transfer of the warehouse receipt in the same manner. The form of the receipt is often such as to indicate an intention that it shall be so transferred.² And though not drawn so as to call for delivery to the bearer, it is at least as transferable as any chose in action;³ which may be transferred without any form of writing; as an equitable mortgage may be created by a deposit of title deeds;⁴ and as a gift of a security may be perfected without a written transfer.⁵

In some of our business centers the custom is to receive grain into large warehouses or elevators, unloading each car or vessel into a common mass, taking care to keep each grade of the grain by itself. For each parcel received, the owners of the elevator give a receipt, specifying the number of bushels, and the grade, and on whose account the grain is so received, and that it is "subject to their order hereon." On a sale or pledge of the parcel, the holder of the receipt indorses upon it an order for the delivery; thus placing the grain under the control of the transferee.⁶

¹ Cartwright v. Wilmerding, 24 N. Y. 521, 536; Waldron v. Romaine, 22 N. Y. 368; Mottram v. Heyer, 5 Denio, 629; Pierce v. Gibson, 2 Ind. 408.

² Rice v. Cutler, 17 Wis. 351; Whitney v. Tibbitts, 17 Wis. 359. There is no distinction in this respect between a warehouse receipt and a bill of lading. The indorsement and delivery of a warehouse receipt is a symbolical or constructive delivery of the goods to the transferee and vests the title to the goods in him. Willets v. Hatch, 132 N. Y. 41, 44.

³ Pettit v. First, etc., Bank, 4 Bush (Ky.), 334; City Bank v. Rome, W. & O. R. R. Co., 44 N. Y. 136; Luckey v. Gannon, 1 Sweeny, 12.

⁴ Daw v. Terrell, 33 Beav. 218; Keyes v. Williams, 3 Y. & C. 55; Williams v. Evans, 23 Beav. 229.

⁵ Sessions v. Moseley, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382; Brown v. Brown, 18 Conn. 310; Westerlo v. De Witt, 36 N. Y. 340.

⁶ Whitney v. Tibbitts, *supra*; Russell v. Carrington, 42 N. Y. 118. In this case 400 bushels of corn in an elevator were sold and paid for, and an order given on the elevator for the same; held that the title passed, and that the separation of the parcel from the common mass, undistinguishable in quality or value, is not necessary to pass the title when the intention to do so is otherwise clearly manifested. The real intent of the transaction is to be carried into effect. Kimberly v. Patchin, 19 N. Y.

§ 218. The third section of our factors' act declares that the factor or agent intrusted with the possession of any merchandise for the purpose of sale shall be deemed the true owner, so as to give validity to his contract for the sale or disposition of the goods for money advanced or securities given on the faith thereof. In terms it gives the same effect to the possession of the goods as it does to the possession of documentary or written evidence of the title. Possession, with authority to sell, enables the agent to procure advances upon the goods.¹ Possession without, or after the authority has been withdrawn, does not enable him to pledge the goods.² And he cannot, without express authority, pledge them as security for an antecedent debt. Acting without such authority, he cannot rightfully pledge the property in any case for his own benefit.

§ 219. Shares of stock in a corporation are now, and have been for many years, habitually pledged as collateral security for money loaned. The pledge is made by a direct transfer of the scrip, in writing, with an authority to effect a transfer in due form on the books of the corporation; and in his note for the sum loaned, the borrower further authorizes the pledgee to sell the stock. The effect of the transaction is not a mortgage, but a pledge of the stock to secure the prompt payment of the money borrowed. On account of its incorporeal nature, property in stocks cannot be otherwise delivered. A delivery of the scrip alone is not considered sufficient, because it does not of itself enable the pledgee to sell the stock and apply the proceeds to pay the debt;³

330. See *Perkins v. Dacon*, 13 Mich. 81; 7 N. Y. 357; 9 Ad. & Ellis, 895. When the delivery is required to satisfy the statute of frauds, on a sale, the order should be accepted or assented to by the warehousemen. *Dixon v. Buck*, 42 Barb. 70; *Potter v. Washburn*, 13 Vt. 538; *Barrows v. Harrison*, 12 Iowa, 588; *Biddle v. Bend*, 6 Best & Smith, 225; *Gibson v. Stevens*, 8 How. U. S. 384.

¹ *Pegram v. Carson*, 10 Bosw. 505. But see *Bonito v. Mosquera*, 2 Bosw. 401; *Merchants' Bank v. Livingston*, 74 N. Y. 223, 228.

² *Nickerson v. Darrow*, 5 Allen, 419; *Fuentes v. Montis*, 16 W. R. 900; 3 L. R. C. P. 268; 37 L. J. C. P. 137; 18 L. T. N. S. 21. Affirmed on appeal, 17 W. R. 203; 38 L. J. C. P. 95; 19 L. J. N. S. 364; 4 L. R. C. P. 93.

³ *Allen v. Dykers*, 3 Hill, 593; S. C. 7 Hill, 497; *Wilson v. Little*, 2 N. Y. (2 Comst.) 443. The form of the note given by the borrower appears in both of these cases; it is very nearly the same now in use. In *Allen v. Dykers* the stock was transferred on the books of the corporation when the note was given; this is not now the custom. In *Wilson v. Little* the transfer was also made on the books of the company on the day the loan was made. In the note now used the maker gives the pledgee authority to sell at the Board of Brokers, N. Y. or at public or private sale. In support of the doctrine stated in the text, see also, *Nisbet v. Macon Bank & Trust Co.*, 4 Woods. C. Ct. 464.

The possession of a blank transfer of a certificate of stock, with irrevocable power of attorney to transfer signed by the person who appears by the certificate to be the

and yet it is quite possible to pledge the stock, without giving to the pledgee every facility to dispose of it by a swift sale.¹ A contract of pledge also arises where a broker receives from a customer an advance of money as a margin, and agrees to purchase and hold stocks for him on speculation; the broker to hold the stocks as a security for the purchase money paid by him beyond the margin advanced. The risk of loss is assumed by the customer; the purchase is made on his behalf, and the agent holds the title to the stock as security. In substance, the transaction creates the legal relation of pledgor and pledgee between the parties. The general title to the stocks is in the customer on whose account the purchase is made; and the broker is therefore bound to hold the same subject to his principal's right of property, under the contract.²

Shares of stock in a bank or banking association may also become pledged to the corporation for the debts and liabilities of the shareholder. Such a pledge arises where the charter or the articles of association provide that the shares of its stock are to be transferred on its books, and that they shall not be transferable unless the shareholder shall first discharge all debts due by him to the bank. The effect of the provision is to pledge each shareholder's stock for any debt or liability incurred by him to the corporate body; and hence every purchaser of the stock takes it subject to this lien.³ A by-law of the association is not effectual to create the lien; clearly not where under the statute the articles of association are to regulate the transfer of the stock.⁴

Under a direct pledge of stock, the owner making the pledge retains the right to vote upon it in the election of directors of the corporation;

owner, confers upon the holder the power to pledge or sell the stock, *as owner* (*McNeil v. Tenth Nat. Bank*, 46 N. Y. 325), but not *as agent* for the owner. *Merchants' Bank v. Livingston*, 74 N. Y. 223.

¹ *Com. Bank of Buffalo v. Kortright*, 22 Wend. 348; *Ex parte Willcocks*, 7 Cowen, 402; *Matter of Barker*, 6 Wend. 509.

² *Markham v. Jaudon*, 41 N. Y. 235; *Horton v. Morgan*, 19 N. Y. 170; *Lawrence v. Maxwell*, 53 N. Y. 19; *Baker v. Drake*, 53 N. Y. 211; *S. C. 66 N. Y. 518*; *Gillett v. Whiting*, 120 N. Y. 402; *Gouman v. Smith*, 81 N. Y. 25.

³ *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *Grant v. Mechanics' Bank of Phila.*, 11 Serg. & Rawle, 143; *Union Bank of Georgetown v. Laird*, 2 Wheat. 390; *Bank of Utica v. Smalley*, 2 Cowen, 770; *McCready v. Rumsey*, 6 Duer, 574. See *Driscoll v. West Bradley & C. M. Co.*, 59 N. Y. 96. A pledgee of a certificate of stock which has printed thereon a by-law that no transfer of the stock shall be made while the owner is indebted to the corporation takes it with notice. *State Savings Assoc. v. Nixon-Jones Printing Co.*, 25 Mo. App. 642. See *Laws of 1890*, Chap. 564, § 26; *Laws of 1892*, Chap. 688, § 26.

⁴ *Bank of Attica v. Manufacturers' & Traders' Bank*, 20 N. Y. 501; 34 N. Y. 30, 80; 13 N. Y. 599; *Cole v. Ryan*, 52 Barb. 168, 172; *Rosenback v. Salt Springs National Bank*, 53 Barb. 495, 502.

a right so evident that no question can arise in reference to it, where the stock remains registered in the name of the pledgor.¹ The contract of pledge is entirely consistent with the owner's rights as a stockholder; until the pledge is rendered available by a foreclosure, he remains a member of the corporate body, interested in its management.² Appearing as a stockholder on the books of the corporation, the inspectors are not at liberty to inquire whether the stock has been hypothecated.³ The inspectors may require each member offering to vote to take and subscribe an oath to the effect that he has not sold or otherwise disposed of his interest in or title to any shares of stock in respect to which he offers to vote, and that all such shares are still owned by him.⁴ Formerly no person could vote at an election of directors of a moneyed corporation on any shares of stock which had been hypothecated or pledged as collateral security.⁵ But the statute containing this prohibition was repealed by the General Corporation Law.

§ 220. A direct transfer of the title to a security or chose in action is perfectly consistent with a contract of pledge; and will be so considered where the whole transaction shows that the transfer was intended as a security, and does not amount to a mortgage or a sale.⁶ In many cases it is quite important that the holder should be invested with the title; and in some cases it is essential that he should hold the title in order to reap the benefits of the security; *e. g.*, where a policy of insurance against loss by fire is assigned as collateral security for the payment of a sum loaned on bond and mortgage, the assignment of the policy is necessary to give the mortgagee the protection of the policy; and the custom is for the holder of the bond and mortgage either to take a formal assignment of the policy, with the consent of the insurer, or to have an entry made upon the policy making the loss, if any shall happen, payable directly to the holder of the mortgage.⁷

¹ *Ex parte* Willcocks, 7 Cowen, 402, 410; *Matter of Jacob Barker*, 6 Wend. 509; *Laws of 1892*, Chap. 687, § 20.

² *Merchants' Bank v. Cook*, 4 Pick. (Mass.) R. 405; 44 Md. 349. The qualifications of members of a corporation to vote are now declared by the General Corporation Law. See Chap. 35, § 20, General Laws; *Laws of 1892*, Chap. 687, § 20.

³ *Matter of Cecil*, 36 How. Pr. 477.

⁴ *Laws of 1892*, Chap. 687, § 22.

⁵ 2 R. S. (7th ed.) 1869, § 37.

⁶ *McLean v. Walker*, 10 John. R. 471; *Campbell v. Parker*, 9 Bosw. 322; *Dewey v. Bowman*, 8 Cala. 145.

⁷ The mortgagee and his assignee have an insurable interest in the premises covered by the mortgage. See *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401.

§ 221. There is nothing to prevent the owner from pledging an existing reversionary interest in chattels or securities; *e. g.*, a consignee who procures advances on a consignment, by depositing the bill of lading with the party making the advance, does not thereby preclude himself from making a further pledge of the same goods; the first pledge being for an amount which does not exhaust their value. The second pledge is rendered effectual by a contract pledging the goods, with an order on the first pledgee for the balance after paying the amount due him; his assent to the order will be sufficient.¹ In like manner, where stocks are held in pledge by a bank for a loan of money, there is nothing to prevent the owner from making a further pledge of them to the bank for additional advances, by a verbal contract. The existing situation dispenses with the necessity of any formal transfer.²

A bond and mortgage may be transferred, as a collateral security, without making a formal written assignment of them; that is to say, by delivering them and receiving advances upon them. After that a written assignment of the securities to a third party will convey the title subject to the advances which have been made upon them.³ A delivery or transfer of the mortgage separate from the bond amounts to nothing; since the mortgage is only a collateral to the bond debt it is given to secure.⁴ A sale of the pledge, a chose in action, to a *bona fide* purchaser for value, is so far effectual, that the pledgor must tender the amount of the original debt to the purchaser.⁵

§ 222. Negotiable notes, bills of exchange, and bonds issued by government or by private corporations in a negotiable form, are usually pledged as collateral security, by a delivery of the instrument so indorsed, where that is necessary, as to vest the title in the pledgee. And the circumstance that the title is in form transferred to the pledgee, does not materially affect the contract of pledge; the pledgee takes the title in trust, to sell the bonds, they being usually bought and sold like stocks, and to collect the negotiable notes or bills when they become due, and apply the proceeds on the debt to secure which they were given.⁶ The contract of pledge may be valid and effectual where the

¹ *Portalis v. Telley*, 5 L. R. Eq. 140; 37 L. J. Chanc. 139; 16 W. R. 503; 17 L. T. N. S. 344.

² *Van Blarcom v. The Broadway Bank*, 37 N. Y. 540. See *Brown v. Warren*, 43 N. H. 430; and also, *Sanders v. Davis*, 13 B. Mon. (Ky.) 432.

³ A mortgage may be assigned by a mere delivery. *Runyon v. Mersereau*, 11 John. R. 534; *Sweet v. Van Wyck*, 3 Barb. Ch. 647; *Haskins v. Kelly*, 1 Robt. 160, 171, and cases there cited.

⁴ *Merritt v. Bartholick*, 36 N. Y. 44.

⁵ *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321.

⁶ *Wheeler v. Newbold*, 16 N. Y. 392.

notes or bills are not properly indorsed to the pledgee; the paper being delivered as a security.¹ The trustee has the right to collect the amount due on the security, in order that he may properly execute the trust.²

The bonds of a state or of a corporation, issued under the authority of law and made payable to bearer, are negotiable in such a sense that the purchaser takes the title by delivery with the rights of a *bona fide* holder.³ He is entitled to hold them, where he purchases them, or makes advances upon them in good faith, and becomes the actual holder of them.⁴ The same rule must apply where bonds or stocks or coupons are left and issued in such a form that they will pass from hand to hand by delivery; on the other hand, where they do not pass as negotiable paper, the pledgee will only acquire the interest of the pledgor in the security.⁵

§ 223. Where a pledge is fairly made, the pledgee does not lose his lien by permitting the owner to take and use the property for a special purpose; as where the captain of a ship pledged his chronometer and was permitted to use it for a voyage;⁶ or where the purchaser of personal property delivers it as security to a person who becomes his surety for the purchase money, and he permits the purchaser to use it tempo-

¹ *Nelson v. Wellington*, 5 Bosw. 178, 187; *Nelson v. Eaton*, 26 N. Y. 410. As to effect of pledge in due form, see ante, §§ 196, 197; *Marine Bank v. Vail*, 6 Bosw. 421; *Brainard v. N. Y. & H. R. R. Co.*, 25 N. Y. 496.

² *Flagg v. Munger*, 9 N. Y. 483, 492.

³ Assumed in *State of Illinois v. Delafield*, 8 Paige, 527; S. C. 2 Hill, 159, 177; *Fisher v. The Morris Canal & Banking Co.*, 3 Amer. Law Reg. 423; *Bank of Rome v. Village of Rome*, 19 N. Y. 20; *Evertson v. Nat. Bank*, 66 N. Y. 14. It is the general rule that the bonds of railroad, manufacturing and other like corporations, payable to bearer, issued for the purpose of securing loans of money, are deemed negotiable, and that the coupons attached thereto partake of the same character. But to give negotiability to such paper it must provide for the unconditional payment to a person, or order, or bearer, of a certain sum of money, at a time capable of exact ascertainment. *McClelland v. Norfolk Southern R. R. Co.*, 110 N. Y. 469. A purchaser for value of negotiable bonds will be protected unless the circumstances are such that an inference could be fairly and legitimately drawn that the purchase was made with notice of a defective title in the seller or in bad faith. *Dutchess County Mut. Ins. Co. v. Hachfield*, 73 N. Y. 226. There can be no *bona fide* holder of town bonds, within the meaning of the law applicable to negotiable paper, where they have been issued without authority, (*Cagwin v. Town of Hancock*, 84 N. Y. 532), unless the legislature has so declared. *Alvord v. Syracuse Savings Bank*, 98 N. Y. 599.

⁴ *Birdsall v. Russell*, 29 N. Y. 220. He cannot take as *bona fide* holder, where he takes with notice. *Starin v. Town of Genoa*, 23 N. Y. 439.

⁵ *Culver v. Benedict*, 13 Gray, 7; *Hodges v. Shuler*, 24 Barb. 68; S. C. 22 N. Y. 114; *Gorgier v. Mieville*, 3 B. & C. 45; *Lang v. Smyth*, 7 Bing. 284.

⁶ *Reeves v. Capper*, 5 Bing. N. C. 136; 47 Ill. 53.

rarily.¹ The pledgee must retain the possession; he need not retain the actual custody of the property, in order to preserve his lien. *E. g.*, where the pledgee of a bond delivers it to the pledgor to get and return stock in exchange for it, he does not part with his title or possession; he may therefore maintain the action of trover against the pledgor for the bond;² he takes the property as an agent or special bailee, subject to the order of the pledgee, and in subordination to the special property.³

The general rule is, that the possession must be taken and retained in order to create and continue the pledge. The rule is properly enforced with some strictness in favor of creditors and third parties; the same reasons require the possession to uphold the lien, which apply where a bailee holds a lien on chattels for work and services.⁴

§ 224. *Relation of Pledge to Original Contract.* A contract of pledge is like a contract of suretyship; it bears much the same relation to the original debt. The original debt is the basis of the new contract; it is the consideration for the contract of pledge.⁵ The original debt being illegal, the law will not enforce a contract of suretyship to secure its

¹ *Ferguson v. Union Furnace Co.*, 9 Wend. 345; treated as a mortgage.

² *Hays v. Riddle*, 1 Sand. 248.

³ *White v. Platt*, 5 Denio, 269; *Way v. Davidson*, 12 Gray (Mass.), 465; *Coleman v. Shelton*, 2 McCord (S. C.), Ch. 123; *Cooper v. Ray*, 47 Ill. 53; *Hutton v. Arnett*, 51 Ill. 98; *Thayer v. Dwight*, 104 Mass, 254.

⁴ *Walker v. Staples*, 5 Allen (Mass.), 34. Bill of sale given of a carryall and chaise as a security, held a pledge; and being given back by the pledgee to the pledgor to let on hire for his own advantage, with care, it was held that the pledgee thereby lost his lien. *Kimball v. Hildreth*, 8 Allen (Mass.), 167. A bill of sale of a watch, amounting to a pledge of it; pledgee redelivered the watch, and no explanation being given, the court held this a waiver of the lien: that the pledgee by relinquishing the possession waives or loses his lien. *Beeman v. Lawton*, 37 Maine, 543; the possession must be taken and retained in order to create and continue a pledge; *Russell v. Fillmore*, 15 Vt. 130, 135. *Treadwell v. Davis*, 34 Cal. 601; *Parshall v. Eggart*, 52 Barb. 367; agreed upon, it may be acquired afterwards; S. C. 54 N. Y. 18. See *Macaulay v. Hopkins*, 35 Hun, 556. Where the pledge is immediately returned to the pledgor, and he is permitted to use the same (horse) as his own property, an attaching creditor will hold the property. *Barrett v. Cole*, 4 Jones Law (N. C.), 40. And a *bona fide* purchaser from the pledgor in possession will hold the property. *Smith v. Sasser*, 4 Jones Law (N. C.), 43. Held also in *Bodenhamer v. Newsom*, 5 Jones Law (N. C.), that the pledgee loses his lien by giving up the property to the pledgor for a special purpose. But a pledgee does not lose his lien where the pledgor has obtained the possession of the thing pledged by fraud or false pretenses. *Bruley v. Rose*, 57 Iowa, 651; *Eaton v. Hodges*, 18 Fed. Rep. 677. The fact that the pledgor assists the pledgee in taking care of the pledged property after its delivery does not necessarily affect the pledgee's rights as against the pledgor's creditors. *Hilliker v. Kuhn*, 71 Cal. 214.

⁵ *Jewett v. Warren*, 12 Mass. 300.

payment;¹ and for the same reason it cannot enforce a contract of pledge made to secure an illegal debt. In other words, the law must leave the parties where it finds them; since it cannot give to either party an affirmative relief where the pledge is made at the time and enters into the original, the illegal contract.² The party paying or advancing money or property under an illegal contract is not allowed to recover it back; that is, the law does not interfere to compel a restoration.³

§ 225. The law does not aid a party in the execution of an illegal contract, and it does not uphold a collateral agreement designed to insure its performance. On this account the assignment of an existing valid bond and mortgage, made at the same time and to secure the fulfillment of an illegal contract, does not transfer the title; and the assignee will not be permitted to reap the advantages of the collateral security by a foreclosure.⁴ For the same reason, a new and subsequent contract, which stipulates for the performance of the illegal agreement, is equally illegal and void; it is void when it is based upon or seeks to fulfill any part of the original contract;⁵ and neither party can obtain the aid of a court in its enforcement. The law cannot show any more favor to the auxiliary than it does to the principal contract; and it cannot suffer itself to be evaded or subverted in any manner.⁶

§ 226. When a contract is not illegal in substance, it is not treated as illegal and corrupt simply because it provides for a prohibited mode of payment, or embraces an illegal stipulation in favor of one party, in no way beneficial to the other. *E. g.*, a deposit of money in a bank creates a legal contract; and though the bank credit the amount in a pass-book, illegally making it payable at a future day, the depositor may recover back the money.⁷ So where a bank of this State borrows money of a

¹Swift v. Beers, 3 Denio, 70; Tyler v. Yates, 3 Barb. 222.

²King v. Green, 6 Allen (Mass.), 139. Held in respect to a watch given in pledge for the hire of a horse for a pleasure drive on a Sunday. The debt is illegal and not collectible. Way v. Foster, 1 Allen, 408.

³Ball v. Gilbert, 12 Met. 397; Sampson v. Shaw, Exr. 101 Mass. 145. In this case the court held a contract to create a *corner* in a certain stock illegal, and that a party to the contract, whose funds had been used in the transaction with his assent, could not recover them back.

⁴De Witt v. Brisbane, 16 N. Y. 508; Schroeppel v. Corning, 5 Denio, 236; Johnson v. Bush, 3 Barb. Ch. 207; assumed in Kellogg v. Adams, 39 N. Y. 28.

⁵Gray v. Hook, 4 N. Y. 449.

⁶Leavitt v. Palmer, 3 N. Y. 19; discussed and distinguished in Curtis v. Leavitt, 15 N. Y. 9, 101, 231; 17 N. Y. 521; Sackett's Harbor Bank v. Codd, 18 N. Y. 240. The first of these cases involve the character of our banking associations and the effect of our restraining laws; they do not depart from the familiar rules stated in the text.

⁷White v. Franklin Bank, 22 Pick. 131.

foreign company and gives notes therefor, illegal by our law because payable on time, and gives a pledge of stocks to secure the payment, the lender, innocent of any intent to evade the law, may hold the pledge.¹ So where a sale of stocks, legal in itself, is made to a banking association, and the seller receives therefor notes illegal simply because payable on time, he may recover the value of the stocks; not being *in pari delicto*, he may recover on an implied undertaking.² The mode of payment is not of the essence of the contract; it is more like a collateral stipulation—a dead limb to be pruned away that the tree may live.

§ 227. Money paid and securities given under extortionate contracts may be recovered back, or the contract held void, as the case may require;³ including in this class of contracts pledges illegally taken by a public officer under color of his office.⁴ But when the parties meet on equal terms, we assume it as quite clear on general principles, that a party pledging goods as security for the performance of an illegal contract, the pledge being made at the time and entering into the terms of the contract, will not be assisted to recover back the pledge. The position of the defendant is one of vantage, only because the law will not give its aid to either party.⁵ When the pledge is made subsequently to secure an illegal debt, it is without consideration; the pledgee can hardly obtain the aid of law to defend his possession of the property; and it admits of some debate whether the pledgor should be allowed to recover back the things pledged, without tendering the amount which is equitably and justly due.⁶ No action at law being required to convert the pledge into a payment, it would seem to follow that it should be treated as a payment; especially where the principal debt is justly due, and vitiated only on grounds of prudential policy.⁷

Pledges given to secure the payment of a debt for money borrowed, on a contract illegal because usurious, may be recovered back under the statute of this State in an action brought by the borrower, without tendering the amount actually due. A purchaser or assignee of the pledge

¹ Curtis v. Leavitt, 15 N. Y. 9.

² Tracy v. Talmage, 14 N. Y. 162-218, and the cases there reviewed by Judges SELDEN and COMSTOCK; Oneida Bank v. Ontario Bank, 21 N. Y. 490; City Bank of N. H. v. Perkins, 29 N. Y. 554.

³ Osborn v. Robbins, 36 N. Y. 365.

⁴ Richardson v. Crandall, 30 How. Pr. 134; 47 Barb. 335; S. C. 48 N. Y. 348.

⁵ Taylor v. Chester, Law Rep. 4 Queen's Bench, 309; Causey v. Yates, 8 Humph. (Tenn.), 605; King v. Green, 6 Allen (Mass.), 140.

⁶ King v. Green, *supra*; Jaques v. Golightly, 2 W. Bl. 1073; Smith v. Bromley, Doug. 670, in note; Scarfe v. Morgan, 4 M. & W. 281.

⁷ Fanning v. Dunham, 5 John. Ch. R. 122. Equity gives relief upon equitable terms. Williams v. Fitzhugh, 37 N. Y. 444.

is not entitled to the same relief, where the pledge is made at the time of the loan.¹ Independent of the statute, equity will not decree a return of the security unless the borrower returns what he has received.² Equity does not enforce a forfeiture: it grants relief in such cases only on equitable terms.³ In an action at law, the securities given on a usurious contract may in this State be recovered back under the statute; the action of trover may be maintained for them.⁴

¹ *Schermerhorn v. Tallman*, 14 N. Y. 93, 126, 131; *Post v. President of Bank of Utica*, 7 Hill, 391; *Rexford v. Widger*, 2 N. Y. 131; *Hartley v. Harrison*, 24 N. Y. 170; *Beecher v. Ackerman*, 1 Robt. 30; Code of Civil Procedure, § 1911; *Alden v. Diossy*, 16 Hun, 311; *Smith v. Cross*, 16 Hun, 487; *Wheelock v. Lee*, 64 N. Y. 242; *Dickson v. Valentine*, 57 N. Y. Supr. Ct. 128. A devisee of lands, subject to a mortgage executed by his testator to secure a usurious loan, cannot maintain an action to cancel the mortgage without first paying or offering to pay the sum actually loaned. *Buckingham v. Corning*, 91 N. Y. 525.

² *Fanning v. Dunham*, 5 John. Ch. 122; *Whittemore v. Francis*, 8 Price R. 616; *Scott v. Nesbit*, 2 Cox's C. C. 183. The security is void; the lender cannot recover on it. *Hammond v. Hopping*, 13 Wend. 505, 511.

³ *Livingston v. Harris*, 3 Paige Ch. R. 528; *Jackson v. Shawl*, 29 Cal. 267.

⁴ *Schroepfel v. Corning*, 6 N. Y. 107; *Cousland v. Davis*, 4 Bosw. 619; *Braynard v. Hoppock*, 7 Bosw. 151; S. C. 32 N. Y. 571. Our statutes against usury remain now substantially as they stood before the revision of 1830; the changes proposed by the revisors, which would have created a consistent and harmonious system, were nearly all of them rejected by the legislature. The eighth section of the present act was among the amendments then proposed and adopted; and this section, it is held, does not abrogate the previously established principle, that on the filing of a bill of discovery, alleging usury, the complainant must pay or offer to pay the principal, or the sum actually lent. The latter clause in this same section, forbidding a court of equity to require or compel payment on deposit of the principal sum as a condition of granting relief, applies only to cases where the complainant, although he can prove the usury without resort to the oath of the lender, has no opportunity of setting up the defense in consequence of the nature of the securities given by him; as for instance, a bond and warrant to confess a judgment, or a mortgage with a power to foreclose under the statute. As a general rule, where the complainant has no legal evidence of the usury, and seeks to compel the defendant to admit or disclose the fact, courts of equity will not compel an answer upon oath, and thus force the defendant to give testimony against himself, where his answer may subject him to a criminal prosecution, to a forfeiture or a penalty. The plaintiff, in such a case, is bound to waive the forfeiture and pay the amount actually loaned, not only because that is just and equitable, but in order to guard against the possibility of the defendant's answer being made the means of subjecting him to a loss in the nature of a forfeiture. *Livingston v. Harris*, 3 Paige Ch. R. 528; 10 Wend. 588; 3 R. S. 73, 5th ed.; *Rexford v. Widger*, 2 N. Y. 131; *Schroepfel v. Corning*, 2 N. Y. 132; *Williams v. Fitzhugh*, 37 N. Y. 451; *Cope v. Wheeler*, 41 N. Y. 303. See *Gerwig v. Sitterly*, 56 N. Y. 214. In Pennsylvania the lawful rate of interest for the loan or use of money in all cases, when no express contract is made for a less rate, is six per cent. per annum. Act of May 28, 1858, 1 P. L. 622. When a rate of interest for the loan or use of money exceeding that established by law is reserved or contracted for, the borrower or debtor

§ 228. From motives of public policy several classes of contracts are pronounced void by the statute of frauds, unless made in writing. In one sense these contracts are illegal, unless they are made in writing: illegal in the sense that they do not conform to the terms of the statute; not corrupt and illegal because they work a violation of the law. And though such a contract cannot be enforced, the party advancing money on it is not allowed to recover it back so long as the other party is ready and willing to fulfill it on his part; and he is allowed to recover back the money so paid where the other party refuses to fulfill the contract.¹ Neither is allowed to maintain an action in affirmance of the contract.² And the party giving a pledge for the performance of the

cannot be required to pay the creditors the excess over the legal rate, and it is lawful for the borrower or debtor, at his option, to retain and deduct the excess from the amount of the debt; and in all cases when the borrower or debtor voluntarily pays the whole debt or sum loaned, together with interest exceeding the lawful rate, no action to recover back the excess can be sustained unless the same is commenced within six months from and after the payment. Excess of interest over six per cent. is the money of the borrower, which, when received by the lender, he cannot retain, but holds for the use of the borrower, and *assumpsit* will lie for it. 63 Pa. 108. As soon as the borrower's right to recover excess of interest accrues, he stands in the relation of creditor to the lender for money had and received to his use. Case is a proper remedy to recover excessive interest. 48 Pa. 130. The general rule as to the measure of damages in an action of *trover* (69 Pa. 408) undoubtedly is well settled to be the value of the goods at the time of the conversion, to which may be added interest to the time of the trial, unless there may be some circumstances of oppression in the case, when the jury may give more. Whenever there is a duty or obligation devolved upon a defendant to deliver stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market, between that time and the time of the trial. The grounds of this exception are that such securities are limited in quantity, and cannot always be obtained at any price, and are of a very fluctuating value. 4 Watts, 142. The pledgee has a right to avail himself of the securities deposited with him by collecting the money on choses in action, when due, and applying it to the payment of his debts; and it is usual for the creditor, when goods or stocks are deposited as collateral security, if the debt is not paid when due, to avail himself of these deposits by sale; and when a promissory note is delivered to a creditor as collateral security, and is not paid when due, he may sue upon it: and it is in the interest of the original debtor that he should do so, since otherwise an available fund might be lost. A creditor is bound to account with his debtor for the proceeds of the security, and cannot have double satisfaction. 63 Penn. St. 108. When goods or securities are deposited as security for the payment of a usurious debt, the creditor is entitled to hold them, and is obliged to surrender them or account for them, on payment of the debt thereby secured, with lawful interest. The action for a conversion of the things pledged may be brought within six years. 69 Penn. St. 408.

¹ Green v. Green, 9 Cowen, 46; Abbott v. Draper, 4 Denio, 51; Ring v. Brown, 2 Hill, 485; Lockwood v. Barnes, 3 Hill, 128; Thomas v. Dickinson, 12 N. Y. 364; Mannen v. Bradberry, 81 Ky. 153.

² Baldwin v. Palmer, 10 N. Y. 232; Watkins v. Rush, 2 Lans. 234.

contract on his part is entitled to recover it back the same as if it were money paid thereon, where the contract is mutually rescinded, or where the other party refuses to fulfill.¹

§ 229. When the principal debt or obligation is conditional, the pledge depends upon the same condition; and it is not available until the debt itself matures.² A defense against the principal debt, based on fraud or duress, enables the owner to recover the pledge; it dissolves the tie by which the pledgee holds it.³ A payment or tender of the amount due accomplishes the same thing; it discharges the lien, and gives the owner the right to take back his pledge.⁴ When the pledge itself is obtained by fraud, the pledgee acquires no interest in it; it may be recovered from him in an action at law.⁵

§ 230. In order to release a pledge, the pledgor must cancel or pay the principal debt, with interest.⁶ To justify an action at law for the things pledged, he must either pay or make a legal tender of the amount due and demand the pledge;⁷ and he ought to do the same thing before bringing his suit in equity to redeem.⁸ In ordinary cases the pledgor's remedy is direct and sufficient at law; and he has no occasion to appeal to a court of equity. Where it is necessary to take an account, with a view to ascertain the terms on which a redemption should be allowed, the pledgor is entitled to relief in equity.⁹ Hence where goods are pawned as security on a running account, the pawnor may, after a refusal of his offer to account with and pay the pawnee the amount to be found due, file his bill for an accounting and redemption; the pawnee can neither defeat nor delay his right to redeem by refusing to account.¹⁰

§ 231. The creditor holding a pledge as collateral security for the payment of a debt may bring his action to recover the amount due.

¹ *Burlingame v. Burlingame*, 7 Cowen, 92; *Rice v. Peet*, 15 John. R. 503; *Hellman v. Strass*, 2 Hilton, 9.

² Code of Louisiana, Art. 3104; *Dykers v. Allen*, 7 Hill, 497.

³ *Osborn v. Robbins*, 36 N. Y. 365.

⁴ *Haskins v. Kelly*, 1 Robt. 160; *Elliot v. Armstrong*, 2 Blackf. 198; *McLean v. Walker*, 10 John. R. 471; *Lawrence v. Maxwell*, 53 N. Y. 19, 23; *Wyckoff v. Anthony*, 90 N. Y. 442; *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Duncan v. Brennan*, 83 N. Y. 487; *Cass v. Higenbottom*, 100 N. Y. 248; *Norton v. Baxter*, 41 Minn. 146.

⁵ *Mead v. Bunn*, 32 N. Y. 275.

⁶ *Bigelow v. Young*, 30 Georgia, 131; *Hendrix v. Harman*, 19 S. C. 483; *Hudson v. Wilkinson*, 61 Texas, 606.

⁷ *Butts v. Burnett*, 6 Abbott, N. S. 302; *Bateman v. Pooler*, 15 Wend. 637; *Strong v. Black*, 46 Barb. 227.

⁸ *Dunham v. Jackson*, 6 Wend. 22.

⁹ *Durant v. Einstein*, 5 Robt. 423, 436. See *Robinson v. Hanley*, 11 Iowa, 410; *Donohoe v. Gamble*, 38 Cal. 340.

¹⁰ *Beatty v. Sylvester*, 2 Nev. 228; *Vaupell v. Woodward*, 2 Sand. N. Y. Ch. 143.

The mere fact that he has taken a pledge to secure the debt does not limit his remedy to recover it; does not affect the remedy given him by law, unless he thus limits or confines himself by contract.¹ Nor will the recovery of a judgment, or the issue of an execution upon it, release the pledge, so long as the debt remains unsatisfied.² The pledge is to be treated consistently as a security for payment: unless there be a contract to that effect, the pledgee is not obliged to sell it; he may rest upon his security and leave his debtor to make his own arrangements and pay the debt.³

§ 232. The relation of the subsidiary to the principal contract appears in many ways: the extinguishment of the principal puts an end to the subsidiary, because the first is the foundation of the second contract. If a defense arises against the principal debt on the merits, it may be used equally to liberate the pledge⁴ (an alleged defense is not sufficient, it must be established). However valuable the pledge may be, the creditor is entitled to nothing more than his debt;⁵ and he is not allowed to hold it as security for any other demand.⁶ He holds the pledge for his own benefit; the contract does not create a trust for the benefit of any other party.⁷ The pledge is given to secure the debt; that is, to insure its actual payment; hence the pledgor cannot recover the pledge on the ground that the principal debt is barred by the

¹ *Whitwell v. Brigham*, 19 Pick. (Mass.) 117; *Ball v. Weyth*, 99 Mass. 338; *Ehrlich v. Ewald*, 66 Cal. 97.

² *Fisher v. Fisher*, 98 Mass. 303; *Morse v. Woods*, 5 N. H. 297; *Chapman v. Clough*, 6 Vt. 123; *McCullough v. Hellman*, 8 Oregon, 191. It is held in Iowa that if the pledgee attaches the goods pledged as the pledgor's property, he abandons the lien of his pledge. *Citizens' Bank v. Dous*, 68 Iowa, 460.

³ *Badlam v. Tucker*, 1 Pick. 400; *Robinson v. Hurley*, 11 Iowa, 410; *Rozett v. McClellan*, 48 Ill. 345.

⁴ *Whitlock v. Stewart*, 13 Ala. 790. In this case a man lent his note to the payee and took a pledge to secure its payment, and the payee lost it in gaming; being notified of this fact, it was held that the pledgee was bound to abstain from doing anything to defeat the pledgor's remedy.

⁵ *Jessup v. City Bank*, 14 Wis. 331.

⁶ *St. John v. O'Connel*, 7 Porter (Ala.), 466; *Gilliot v. Lynch*, 2 Leigh (Va.), 493. *Duncan v. Brennan*, 83 N. Y. 487; *Continental Nat. Bank v. Bell*, 125 N. Y. 38; *Wyckoff v. Anthony*, 90 N. Y. 442; *Vanderzee v. Willis*, 3 Bro. Ch. 21; *Jarvis v. Rogers*, 15 Mass. 389; *Newman v. Greenville Bank*, 67 Miss. 770; *Masonic Savings Bank v. Bangs*, 84 Ky. 135; *Woolley v. Louisville Banking Co.*, 81 Ky. 527; *Fridley v. Bowen*, 103 Ill. 633; *Talmage v. New York Bank*, 91 N. Y. 531; *San Antonio Nat. Bank v. Blocker*, 77 Texas, 73; *Loyd v. Lynchburg Nat. Bank*, 14 Va. L. J. 173. The pledge may by agreement become a general security. *Moors v. Washburn*, 147 Mass. 344.

⁷ *Peck v. Morrell*, 26 Vt. 686.

statute of limitations ;¹ the statute operating upon the remedy and not upon the debt.²

§ 233. The delivery of a chattel as a pledge, in anticipation of a loan of money to be made thereon, is strictly conditional ; it conveys no interest until the loan is made. Unless the money is advanced, a refusal to return the chattel is a conversion of it. A cause of action thus arising is assignable ; but a specific sale of the chattel, after the conversion, does not of itself transfer the cause of action. There must be a subsequent demand made by the purchaser.³

A contract for a pledge, ineffectual for the want of a delivery of the goods, is rendered valid by a subsequent delivery of them ; in the absence of fraud, the pledgee first acquiring the possession, may hold the goods. In other words, the contract of pledge is incomplete until the delivery is made ; and in these circumstances there is nothing to prevent a creditor from acquiring a lien upon the goods, and thus defeating the pledge ; nor is there anything to prevent a completion of the contract of pledge by a subsequent delivery.⁴

§ 234. *Pledgee's Duty in Preserving.* The pledgee impliedly stipulates that he will take ordinary care of the things pledged. Since the bailment is beneficial to the pledgee by securing the payment of his debt, and to the pledgor by procuring him credit, the law prescribes ordinary care as the measure of the bailee's duty in preserving the property ;⁵ a rule prescribed by natural reason and enforced in our law from the days of Bracton.⁶ The bailment being beneficial to both par-

¹ Jones v. Merchants' Bank of Albany, 5 Robt. 162; Roots v. Mason City Salt & Mining Co., 27 W. Va. 483; Hudson v. Wilkinson, 61 Texas, 606; Rumsey v. Laidley, 34 W. Va. 721.

² Pratt v. Huggins, 29 Barb. 277; Thayer v. Mann, 19 Pick. 535; Bank of the Metropolis v. Gutschlick, 14 Peters, 19, 32.

³ Hall v. Robinson, 2 N. Y. 293; McKee v. Judd, 12 N. Y. 622; The People v. Tioga Common Pleas, 19 Wend. 73.

⁴ Parshall v. Eggart, 54 N. Y. 18. A pledge comes under the statute against fraudulent conveyances and contracts ; and the question of fraud is one of fact for the jury.

⁵ Arent v. Squires, 1 Daly, 347; Abbett v. Frederick, 56 How. Pr. R. 68; Cooper v. Simpson, 41 Minn. 46; Willets v. Hatch, 132 N. Y. 41; Cutting v. Marlor, 78 N. Y. 454.

⁶ Bracton, 99 b. Henry de Bracton is supposed to have been a judge or justiciary. He wrote his treatise, *De Legibus et Consuetudinibus Angliæ*, as early as the reign of Henry III. His quotations come down to the forty-sixth year of that long reign of fifty-six years, which commenced in 1217. Almost nothing seems to be known of his personal history, notwithstanding he held for a long period so high a place as one of the authorities of the English law, and was cited, as late as the time of Lord Coke, as the first source of legal knowledge. He is admitted to have been a master of the common law, and he quotes the Roman Code with great freedom ; from which he is sup-

ties, the duty of the bailee in the keeping of the property is substantially the same as in a bailment for hire. He is bound to keep and preserve the property with ordinary care; that care which a prudent man ordinarily takes of his own property. He is not bound for the exactest care and diligence required of a borrower; and he is liable for a greater degree of care than the law exacts of a depositary without reward.¹

§ 235. The pledgee is not liable for a loss of the pledge by fire or by theft, where he has kept it with ordinary and reasonable care, considering the nature of the property. By itself, the fact of a loss by theft does not render the pledgee liable; it bears upon the question of diligence; it calls for some explanation; the pledgee is liable where the theft is occasioned by his negligence, and he is not liable where the property is stolen without any want of due care on his part.²

The pledgee is bound to exercise that sort of care of the goods which a man of business takes of his own property of a like kind; he is bound to employ the usual means for their safe keeping. And where he uses the property in any manner, it is quite clear that he must take additional care to prevent loss or injury from such use.³ Using the pledge without any express or implied permission, he ought to bear the risk of all losses arising from his use of the property. But where the pledge is of such a nature that the pledgee is at a charge for its keeping, as a horse or cow, he may use the horse in a reasonable manner, or milk the

posed to have derived his clear, nervous, and expressive style. Many of our current maxims came to us through him from the civil law. 2 Reeves' English Law, 88, 90; 2 Ld. Raym. 909. See also, *Lives of the Chief-Justices*, by Lord Campbell, 1 vol. p. 78.

¹ *Erie Bank v. Smith, Randolph & Co.*, 3 Brewster, 9; *St. Losky v. Davidson*, 6 Cal. 643; *Commercial Bank v. Martin*, 1 La. Ann. 344; *Petty v. Overall*, 42 Ala. R. 145; *Jenkins v. The National Village Bank, etc.*, 58 Maine, 275. See *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263, as to the liability of a bank for the loss of bonds held as collateral security for discounts after the last note discounted has been paid. For a case illustrating the liability of a depositary without reward, see *Lancaster Co. National Bank v. Smith*, 62 Penn. St. 47; and for a case applying the rule of liability of the borrower of bonds to be used as a pledge for advances, see *Archer v. Walker*, 38 Ind. 472. That the pledgee is liable for the same degree of care as a bailee for hire is assumed in all the cases. *Jenkins v. The National Village Bank*, supra; *Feld v. Brackett*, 56 Maine, 121; *Schmidt v. Blood*, 9 Wend. 268; *Bakewell v. Talbott*, 4 Dana (Ky.), 216, a peculiar case.

² 2 Kent's Comm. 580, 581; per Chief-Justice HOLT, 2 Ld. Raym. 909; *Jenkins v. The National Village Bank, etc.*, supra, 58 Maine, 275; *Petty v. Overall*, 42 Ala. R. 145; *Abbott v. Frederick*, 56 How. Pr. R. 68; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263. Where the goods are placed in a given store for safe keeping with a mutual understanding, a removal of them by the pledgee will go far to establish his liability for a subsequent loss. *St. Losky v. Davidson*, 6 Cal. 643.

³ *Thompson v. Patrick*, 4 Watts (Pa.), 414.

cow in recompense for the meat.¹ The use not being the object of the contract, the pledgee has no implied permission to use a pledge for the keeping of which he incurs no expense.²

§ 236. Where the goods are lost, it is incumbent upon the bailee to account for his failure to restore them, by showing a loss by some violence, theft or accident; this being done, the burden of proving a want of due care rests with the bailor; and he cannot recover unless the facts and circumstances in evidence show a want of due care on the part of the bailee, and a loss or injury arising therefrom.³ Where the bailee is bound for ordinary diligence, and wholly fails to restore the goods, it is incumbent upon him to show a loss under such circumstances as will exculpate him; and this sometimes casts upon him the burden of proof upon the main issue in the cause.⁴ But if the plaintiff's right to recover depends upon proof of a loss by the defendant's negligence, the affirmative must be established by the plaintiff; the law cannot presume the fact in his favor, though the jury may find it from the circumstances attending the loss.⁵

Proof of a loss by fire does not ordinarily raise a presumption of negligence on the part of the bailee; that being one of the casualties against which most men guard themselves by insurance.⁶ More intentional, if not more habitual, care is generally taken to prevent losses by theft and embezzlement; and hence the omission of customary precautions in the line of business affords some evidence of negligence; such as the failure to lock up the premises where the goods are stored, or the neglect to secure valuable articles, negotiable bonds and securities in a place of safety, or the neglect to adopt approved methods of guarding against robbery and theft.⁷

§ 237. The bailee receiving a benefit from his services, stands in the relation of a trustee of the property and is bound to keep it with the

¹ Per Chief-Justice HOLT, in *Coggs v. Bernard*, 2 Ld. Raym. 909, 917.

² The pledge is given as security; it does not imply any intent to give the pledgee an indirect benefit; he must therefore account for whatever income he receives from the pledge. *Houton v. Holliday*, 2 Murphy, N. C. 111.

³ *Foot v. Storrs*, 2 Barb. R. 326; *Schmidt v. Blood*, 9 Wend. 268. The bailee must give some account of the property. *Bush v. Miller*, 13 Wend. 481.

⁴ *Arent v. Squires*, 1 Daly, 347; *Schwerin v. McKie*, 5 Robt. 404, 419.

⁵ *Lamb v. Camden & Amboy R. R. & Tr. Co.*, 46 N. Y. 271, 278.

⁶ 46 N. Y. 271, 278-282. Is a loss by fire on one's own premises presumptive evidence of negligence? See Judge PECKHAM's dissenting opinion, 46 N. Y. 285.

⁷ *Schwerin v. McKie*, supra, 5 Robt. 405. The defendant, a warehouseman, failed to deliver 52 boxes of cigars, part of a large parcel, and there was some proof of negligence by omission of proper fastenings. See *Erie Bank v. Smith, Randolph & Co.*, 3 Brewster, 9.

care and diligence of a provident owner. A trustee of personal property, under a voluntary assignment to him, must exercise the same care and attention which a prudent person or a man of reasonable and ordinary diligence would use for himself. The rule is not as it is sometimes stated to be, that the trustee must take precisely the same care in behalf of his *cestui que* trust as he would do for himself. The rule does not bend itself to the individual character; and therefore an assignment is void which contains a provision exempting the assignee from liability for any losses to the trust fund, unless the same happen by reason of his gross negligence or misfeasance. The law prescribes a more stringent rule of liability, and it refuses to uphold an assignment designed to defeat a just rule of responsibility.¹ It will not suffer an insolvent to place his property in the hands of a trustee on such terms.

Public policy does not prevent ordinary bailees from stipulating for an increased or for a diminished liability; on the contrary, it gives the utmost freedom, within the limits of fair dealing. No other persons being interested in the contract except the immediate parties, the law allows them to stipulate for the manner in which the property shall be kept or stored.² It even allows a common carrier, whose duties are of a public nature, to stipulate for a liability less than that implied by law; and these stipulations often place him in the category of a bailee for hire, liable for ordinary care and diligence.³ But a stipulation by an ordinary bailee, exempting himself from any care whatever, can hardly be upheld; it has the form of a contract, without its substance.⁴

§ 238. When the promissory note of a third person is deposited by a debtor with his creditor, as collateral security for a debt, the note is a pledge; the pledgee has a special property in the note, and a right to receive the amount to become due upon it; and in case of non-payment, a right to collect the same by an action thereon against the maker.⁵ The pledgee receiving it as security on an existing debt, cannot be regarded as a holder for value in the commercial sense; but he has the

¹ *Litchfield v. White*, 3 Sand. R. 545; S. C. 7 N. Y. (3 Seld.) 438; *Olmstead v. Herrick*, 1 E. D. Smith, 310.

² *Conway Bank v. American Ex. Co.*, 8 Allen R. 512; *Eastman v. Patterson*, 38 Vt. 146; ante, § 48.

³ *Transportation Co. v. Downer*, 11 Wallace, 129; *Clark v. Barnwell*, 12 How. U. S. 272; *French v. N. Y. & Erie R. R. Co.*, 4 Keyes, 108.

⁴ *Alexander v. Greene*, 3 Hill R. 9; S. C. 7 Hill R. 533; *Smith v. N. Y. C. R. R. Co.*, 24 N. Y. 222-251; *Wooden v. Austin*, 51 Barb. 11; 54 Barb. 559.

⁵ *Bowman v. Wood*, 15 Mass. 534; *Tarbell v. Sturtevant*, 26 Vt. 513; *Andros. Railroad v. Auburn Bank*, 48 Maine, 335; *Farwell v. Importers', etc., Nat. Bank*, 90 N. Y. 483; *Wheeler v. Newbould*, 16 N. Y. 392; *Nelson v. Eaton*, 26 N. Y. 410.

right to recover on the note.¹ He has the possession, and the maker cannot safely pay it to any other party.² The note being payable to bearer, or to order and endorsed in blank, is transferable by mere delivery so as to vest the legal title in the holder; hence he may recover on it the amount due.³

The pledgee has no right to compromise with the maker of the note, or surrender it for anything less than the amount due, or to dispose of it in any other manner. He holds the note as a security, and the money when collected or received upon it, as a substitute for the note, upon the same terms, until his principal debt becomes due.⁴ Like other choses in action, bills, bonds, and mortgages, notes are to be collected; the pledgee cannot sell them at public or private sale, unless he is specially authorized to do so; a usage to that effect is illegal.⁵ And though specially authorized to sell the note at public or private sale, the pledgee may also sue and recover upon it in his own name.⁶ Having a right to collect, he has the right to recover on a chose in action, in furtherance of the object of the trust.⁷

§ 239. The pledgor retains the right to negotiate or collect the note, provided he discharge the lien of the pledgee before judgment;⁸ he may transfer the note to a third person, subject to the lien, and that person may maintain an action on it as indorsee in his own name; but he must redeem and produce the note before he can have a recovery, because a judgment on it works a merger of the note; the note is merged in, and extinguished by the judgment.⁹ On this ground a judgment against one of several partners on a promissory note executed by the firm, is held a bar to a subsequent action against the other partners. It extinguishes the original debt, or merges it in the higher

¹ *Manhattan Co. v. Reynolds*, 2 Hill, 140; *Liggett Spring & Axle Co.'s Appeal*, 111 Pa. St. 291. The pledgee is a holder for value when he receives it as a security on a present loan. *Bank of N. Y. v. Vanderhorst*, 32 N. Y. 553.

² *President Bank of Poughkeepsie v. Hasbrook*, 6 N. Y. 216.

³ *Bank of Charleston v. Chambers*, 11 Rich. 657; *Sheldon v. Middleton*, 10 Iowa, 17; *Wright v. Boyd*, 3 Barb. 523, 528; 15 Mass. 534; 2 Hill, 140; *Bank of Chenango v. Osgood*, 4 Wend. 607-612; *Flagg v. Munger*, 9 N. Y. (5 Seld.) 483, 492; *Jones v. Hawkins*, 17 Ind. 550.

⁴ *Garlick v. Jones*, 12 John. R. 145; *Depru v. Clark*, 12 Ind. 432; *Livor v. Orser*, 5 Duer, 501, 506. See *Chapman v. Brooks*, 31 N. Y. 75; *Comstock v. Hier*, 73 N. Y. 269; *Farwell v. Importers'*, etc., Nat. Bank, 90 N. Y. 483.

⁵ *Wheeler v. Newbould*, 16 N. Y. 392; *Strong v. National Mechanics' B. Asso.*, 45 N. Y. 718; *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Ill. 584.

⁶ *Nelson v. Eaton*, 26 N. Y. 410.

⁷ *Flagg v. Munger*, *supra*,

⁸ *Fisher v. Bradford*, 7 Greenl. 28.

⁹ *Thompson v. Hewitt*, 6 Hill R. 254; *Pierce v. Kearney*, 5 Hill R. 82.

security.¹ Hence, to permit the pledgor or his indorsee to prosecute the note deposited in pledge to judgment, without discharging the lien, would be to permit him to wrest from the pledgee his security or interest in the pledge.²

§ 240. The pledgee of indorsed negotiable paper has the right to demand payment and to charge the indorsers by giving them due notice of non-payment;³ and it is without doubt his duty to use all reasonable care to charge them with notice. He alone has the right to demand and receive payment; and he has the custody of the paper. Under the circumstances, no other person can practically present the paper; it is, therefore, the duty of the pledgee to take the necessary steps to charge the indorsers.⁴ He impliedly engages to do so; the same as a creditor who receives notes for the price of goods previously sold, or on an existing demand.⁵ An immediate notice to the debtor or to the pledgor is not required; it is sufficient to give *him* a reasonable notice of the failure to obtain the money on the paper.⁶

§ 241. Securities and choses in action are often assigned or transferred as collateral security, upon an agreement or trust making it the duty of the transferee to collect the same and apply the proceeds upon the debt thus secured. Under such a contract, the pledgee is bound for the exercise of active diligence; his duties are like those of a general assignee for the benefit of creditors; and not unfrequently an assignment for the benefit of creditors operates like a pledge, being made primarily to secure debts due to the assignee.⁷ He may be rightfully vested with a legal discretion, to be exercised in the compromise and collection of debts, and in the sale and disposition of the assigned property;⁸ he

¹Robertson v. Smith, 18 John. R. 459; Olmstead v. Webster, 8 N. Y. (4 Seld.) 413. See Suydam v. Barber, 18 N. Y. 468, 470; Oakley v. Aspinwall, 4 Comst. 513; Waggoner v. Walrath, 24 Hun, 443.

²In a suit on a negotiable note, the plaintiff, in order to recover, must ordinarily produce the note. He cannot otherwise prove its execution.

³Bachelor v. Priest, 12 Pick. 399; Jones v. Fort, 9 B. & C. 764; 4 Man. & R. 547; Tenant v. Strachan, Moody & M. 377; 4 Carr. & P. 31; Edwards on Bills and Notes, 495.

⁴Foot v. Brown, 2 McLean, 369; Russell v. Hester, 10 Ala. 535. That the holder of a note as collateral is not charged with the duty of an indorsee, see Kennedy v. Rosier, 71 Iowa, 671.

⁵Tobey v. Barber, 5 John. R. 68; Jones v. Savage, 6 Wend. 658; Dayton v. Trull, 23 Wend. 345.

⁶Gibson v. Tobey, 53 Barb. 191, 199.

⁷Brainard v. Dunning, 30 N. Y. 211; Goddard v. Winthrop, 8 Gray, 180. See Vallance v. Miners' Life Ins., etc., Co., 42 Pa. St. 441.

⁸Townsend v. Stearns, 32 N. Y. 209, and cases there cited; Dow v. Platner, 16 N. Y. 562.

cannot be lawfully clothed with an absolute personal discretion, inconsistent with the nature of the trust.¹

The contract by which a single chose in action is transferred as security for the payment of a debt is not governed by precisely the same rules which apply to a general assignment for the benefit of creditors; it will therefore be held valid where it provides for the payment of the expenses of the collection, the discharge of the debtor thereby secured, and the return of the balance of the proceeds to the assignor.² The contract, being free from fraud, prescribes the duties and liabilities of the assignee; it transfers the title.³ For some purposes the assignee may be regarded as the general owner, and as such notified to sue;⁴ and still held liable to the assignor for the use of diligence in the collection of the demand—liable according to the terms of his agreement, or to the extent of the contract implied from the nature of the transaction.⁵

§ 242. What is the duty of the pledgee or party receiving bills and notes or other choses in action as collateral security, in respect to their collection? Is he bound to a prompt and diligent effort to collect them by suit? He is clearly so bound, where he receives from his debtor a third person's note past due, under a request that he shall collect the same and apply the proceeds upon the original demand.⁶ In the absence of any special agreement, his duty in the premises results from the situation in which he is placed; he is bound to ordinary diligence in preserving the legal validity of the pledge, and must when necessary take active measures to collect of the parties to the collateral security.⁷

¹ *Barney v. Griffin*, 2 N. Y. 2 Comst. 365; *Nicholson v. Leavitt*, 6 N. Y. 2 Seld. 510; *Brigham v. Tillinghast*, 13 N. Y. 215; *Dunham v. Waterman*, 17 N. Y. 9; *Nichols v. McEwen*, 17 N. Y. 22. An unnecessary provision will not affect the assignment. *Casey v. Janes*, 37 N. Y. 608.

² *Smith v. Ripley*, 33 Conn. 306. Not allowed in a general assignment. *Barney v. Griffin*, 2 N. Y. 365.

³ *Harris v. Schultz*, 40 Barb. 315; 56 Barb. 413.

⁴ *Pickens v. Yarborough*, 26 Ala. R. 417.

⁵ *Condin v. Jones*, 23 Geo. R. 175; *Powell v. Henry*, 27 Ala. R. 417; *Ward v. Morgan*, 5 Sneed R. 79; *Williamson v. McClure*, 37 Penn. St. 402.

⁶ *Wakeman v. Gowdy*, 10 Bosw. 208.

⁷ *Jennison v. Parker*, 8 Mich. 355; *Lamberton v. Windom*, 12 Minn. 232, 241; *Roberts v. Thompson & Clark*, 14 Ohio St. 1, 7; *Lee v. Baldwin*, 10 Geo. 208; *Whitin v. Paul*, 13 R. I. 40; *Rumsey v. Laidley*, 34 W. Va. 721; *Harper v. Second Bank*, 12 Lea (Tenn.), 678. It has been held that if by any fault of a creditor who holds collaterals guaranteed by the debtor, the collaterals become worthless, the creditor must bear the loss. *Douglass v. Mundine*, 57 Texas, 344. It has also been held that where the payee of a note guarantees it and indorses it over to a savings bank as collateral, and the latter holds it for a year and a half after it matures and until the maker becomes insolvent, the payee and not the bank must bear the loss in the absence of any re-

He is said to be liable under the rules of law applicable to an agency;¹ his position is exactly analogous, and his duty may be likened to that of a creditor holding a guaranty of a debt; ordinarily, he is not obliged by his duty to the debtor to take any active measures to collect on the collateral; the debtor's liability is not changed by the new security; he remains the principal debtor, bound affirmatively to pay his debt.² In equity the pledgee may reasonably be called upon to take measures to preserve the value of the security or to render it available; especially under circumstances where his refusal to take such action would result in a total loss of the pledge. Anticipating the failure of a party to the collateral security, the pledgor must have the right, on fair terms, to insist upon active measures to collect.³ A surety, though absolutely bound to pay a debt, has such a right;⁴ and it cannot fairly be denied to a pledgor, without opening the door to fraudulent dealings, where some emergency renders active steps essential, and the pledgee is requested to move in the premises.⁵

§ 243. Many decisions assume, without deciding it to be the duty of a pledgee to hold and collect negotiable notes or other choses in action, received as collateral security on a debt; on the theory that the implied understanding is, that the collaterals are to be made effectual as a payment of the debt. And although it cannot be affirmed that a contract of pledge does of itself oblige the pledgee to use active measures to col-

quest by the payee that the note shall be collected. *City Savings Bank v. Hopson*, 53 Conn. 453. If the creditor taking the notes of third persons as collateral agrees to collect them and credit the amounts on the debt, and then allows them to become outlawed, he must account to the debtor for their loss. *Sample & Birge Manuf. Co. v. Detwiler*, 30 Kansas, 386. But if the creditor makes no such agreement, and without negligence on his part fails to collect the collaterals, he may still recover the amount of his debt from the pledgor. *Marschuetz v. Wright*, 50 Wis. 175. In the absence of any fault or negligence on the part of the pledgee, he is chargeable only with the amount collected on the collaterals. *Henry v. Travelers' Ins. Co.*, 42 Fed. Rep. 363. Only reasonable diligence is required of him. *Chaffe v. Purdy*, 43 La. Ann. 274. But he cannot avoid liability for negligence in the collection by showing that he placed the securities in the hands of attorneys of high standing for collection, and that the negligence was the negligence of such attorneys. *Plymouth County Bank v. Gilman*, 6 Dak. 304. See *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26.

¹ *Lawrence v. McCalmont*, 2 How. U. S. 426; *Roberts v. Thompson*, 14 Ohio St. 1.

² *Schroeppell v. Shaw*, 3 Comst. (3 N. Y.) 446; 5 Barb. 580.

³ See circumstances disclosed in *Lamberton v. Windom*, supra; and *Hayes v. Ward*, 4 John. Ch. 123. A surety has such a right. *Ellsworth v. Lockwood*, 42 N. Y. 89, 98; *Lewis v. Palmer*, 28 N. Y. 271.

⁴ *Paine v. Packard*, 13 John. R. 174. The rule is not to be extended. *Wells v. Mann*, 45 N. Y. 327.

⁵ Good faith and fair dealing are all that the pledgor can demand. *Black River Bank v. Page*, 44 N. Y. 453.

lect a chose in action held as a collateral ; it is quite clear that he must do so, where it appears from the circumstances that the pledge was made on that understanding, or where after some lapse of time such measures become necessary to prevent a total loss of the security.¹

§ 244. Of itself, the pledgee's omission for a number of years to sell stocks, deposited with him as collateral security, is not regarded as rendering him liable for their loss or depreciation. As the pledgor has at any time the right to pay the debt secured by the pledge, and thus repossess himself of the stock, he ought not to complain that the pledge is retained for the exact purpose for which it was made. It is for him to take affirmative action in the premises ;² and he can liberate the pledge at any moment by paying the debt.³

§ 245. *What Property in the Pledgor and Pledgee ; and resulting Rights and Duties.* The general property in chattels bailed under the contract of pledge remains in the bailor, and only a special property in them passes to the bailee.⁴ The bailor retains the title, and a right to redeem by discharging the original debt or obligation ; and the bailee acquires the possession, with a right to detain the goods until his debt is paid. But the non-payment of the debt, even after it is due, does not work a forfeiture of the pledge ; the title remains in the pledgor until it is legally divested, either by a foreclosure in equity or by a sale on due

¹ In Pennsylvania the creditor holding a collateral, must do whatever is necessary to keep it alive. *Hanna v. Holton*, 78 Penn. St. 334. *Wakeman v. Gowdy*, 10 Bosw. 208. In this case a note past due was received as a collateral security on a request to collect it and apply the proceeds on the debt ; held that the debtor became a guarantor of the collection. So that a suit became necessary under the decision in *Craig v. Parkis*, 40 N. Y. 181. *Wheeler v. Newbold*, 16 N. Y. 392. This case decides only the negative proposition that commercial paper cannot be sold ; though it justifies the inference that the paper ought to be collected. The following cases support the text : *Jennison v. Parker*, 8 Mich. 355 ; *Lamberton v. Windom*, 12 Minn. 232 ; *Roberts v. Thompson & Clark*, 14 Ohio St. 1 ; *Lee v. Baldwin*, 10 Geo. 208 ; *Lawrence v. McCalmont*, 2 How. U. S. 426 ; and the following must be accepted as qualifying it : *Schroeppell v. Shaw*, 3 N. Y. 446 ; S. C. 5 Barb. 580 ; *Black River Bank v. Page*, 44 N. Y. 453 ; *Wells v. Mann*, 45 N. Y. 327 ; directly in point ; *Taggard v. Curtenius & Jones*, 15 Wend. 155.

² *Taggard v. Curtenius*, 15 Wend. 155 ; *Rozett v. McClellan*, 48 Ill. 345 ; *Corning v. Pond*, 29 Hun, 129. In the absence of any contract making it the duty of the pledgee to sell within a specified time, the pledgee is liable only for neglect to exercise ordinary care, and the pledgor cannot make it the duty of the pledgee to sell by merely requesting or directing him to do so. *Minneapolis, etc., Elevator Co. v. Betcher*, 42 Minn. 210 ; *Cooper v. Simpson*, 41 Minn. 48.

³ *Lawrence v. Maxwell*, 53 N. Y. 19. The debtor can gain nothing by mere delay ; even the recovery of a judgment on the debt secured does not liberate the pledge till the debt is paid. *Fisher v. Fisher*, 98 Mass. 303.

⁴ *Garlick v. James*, 12 John. R. 147 ; *Farwell v. Importers', etc., Nat. Bank*, 90 N. Y. 483.

notice. Before giving such notice, the pledgee has no right to sell; and if he do so, the pledgor may recover the value of the pledge from him, without tendering the debt; because by the wrongful sale the pledgee has incapacitated himself to perform his part of the contract, that is, to return the pledge, and it would therefore be nugatory to make the tender.¹

The mortgage of goods, with a stipulation that the mortgagor may redeem them by the payment of a sum named on a given day, is a very different contract. Here the title passes, and the mortgagor reserves only a naked right of redemption within the period agreed upon. As soon as that is passed, the right of the mortgagee becomes absolute.² Where there is a sale of goods, delivered as a security for money to become due, it is a mortgage and not a technical pledge; and the right of redemption does not continue beyond the default made in payment.³

¹ *Stearns v. Marsh*, 4 Denio R. 227; *Cortelyou v. Lansing*, 2 Caines' Cases in Error, 200. This case is cited with approbation in *Hart v. Ten Eyck*, 2 John. Ch. 62, 101; in *McLean v. Walker*, 10 John R. 471, 474; in *West v. Beach*, 3 Cowen, 82, 83; in *McFarland v. Wheeler*, 26 Wend. 467, 475; in *Huntington v. Mather*, 2 Barb. 538, 542; in *Brownell v. Hawkins*, 4 Barb. 491, 493; in *Milliman v. Neher*, 20 Barb. 37, 40; in *Seaman v. Luce*, 23 Barb. 240, 255; in *Stearns v. Marsh*, 4 Denio, 227, 231; in *Wilson v. Mathews*, 24 Barb. 295, 297; in *Roberts v. Sykes*, 30 Barb. 173, 175, 177; in *Hoskins v. Kelly*, 1 Robt. 160, 172; in *Millikin v. Dehon*, 10 Bosw. 325, 328; in *Romaine v. Van Allen*, 26 N. Y. 309, 311; in *Saul v. Kruger*, 9 How. Pr. 569, 571; in *Wilson v. Little*, 1 Sand. 351, 357; in *Ogden v. Lathrop*, 1 Sweeny, 643, 647; in *Clark v. Pinney*, 7 Cowen, 681, 694; in *Wheeler v. Newbold*, 5 Duer, 29, 36. Judge DUEK here mentions the well-known fact that the opinion in *Cortelyou v. Lansing* was never actually delivered; as the Chancellor stated in *Barrow v. Paxton*, 5 John. R. 260. But that circumstance has not prevented it from assuming its place as a leading authority, cited constantly and in many other cases besides those above mentioned. The doctrine of the text does not apply where the parties have stipulated that on default of payment at the time specified the pledgee may sell the property pledged without notice. *Williams v. United States Trust Co.*, 133 N. Y. 660. Nor does it apply to a case where a sale is made by the pledgee before the maturity of the debt secured under a stipulation in the contract giving him the right to make such sale and to return like property to the pledgor on payment or tender of the loan. *Ogden v. Lathrop*, 65 N. Y. 158. See also, *Chouteau v. Allen*, 70 Mo. 290.

² *Ackley v. Finch*, 7 Cowen R. 290; *Brown v. Bement*, 8 John. R. 97.

³ *Barrow v. Paxton*, 5 John. R. 259; 8 John. R. 97. Taking a bill of sale of personal property, absolute in terms, intended as a collateral security, is to be regarded as a pledge. The radical distinction between a pledge and a mortgage is, that by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition; while in case of a pledge, the pledgor retains the general title in himself, and parts with the possession for a special purpose. *Walker v. Staples*, 5 Allen (Mass.), 34. A transfer in form does not prevent the contract from being considered a pledge, where it is made as a collateral security. *Kimball v. Hildreth*, 8 Allen, 167; *Marshall v. Williams*, 2 Hayw. N. C. 405. The essence of the contract and not its form determines its character. *Bunacleugh v. Poolman*, 3 Daly, 236.

§ 246. The difference between a mortgage and a pledge of goods or choses in action is marked and easily understood, but in practice it is often somewhat difficult to decide whether the contract entered into is to be treated as a mortgage or a pledge. The general distinction between them is, that in a mortgage the title is conveyed with a condition of defeasance, that is to say, a condition rendering the conveyance void, on the payment of a certain sum or sums of money, on or before the day agreed upon; while in a pledge, the goods bailed are deposited as a collateral security, and only a special property is transferred to the pawnee, the general title to the property in the meanwhile remaining with the pawnor.¹ In respect to goods and chattels personal, this distinction is very plain; but there is a large class of cases where the contract still remains a pledge, notwithstanding the title is conveyed.² Choses in action cannot be otherwise delivered as a collateral security, and hence as to these and such incorporeal property as cannot be passed from one to another by delivery, the fact that the title passes does not, as has sometimes been held, create a mortgage.³ Whether the contract shall be held a mortgage or a pledge is not determined by that fact alone; the title must be conveyed in order to create a mortgage, but it is not a mortgage simply because the title is conveyed. To create the contract of pledge there must be a delivery of possession, or a conveyance of title, that draws to itself the possession; while a mortgage of chattels or choses in action is sometimes valid without such delivery.⁴

§ 247. Though the transfer of stocks be absolute, still if its object and character are qualified and explained by a cotemporaneous paper, which forms part of the contract and declares it to be a deposit of the stock as collateral security for the payment of a loan, and there is nothing in the contract to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressly conferred in the agreement, the transaction will be regarded as a pledge. The intention of the parties and the real effect of their agreement are to be considered and respected in its enforcement.⁵ The use of the terms, "I hereby pledge and give a lien on," in a contract giving security upon a chattel for the payment of a debt on a future day, permitting

¹ 1 Cowen's Tr. 340, 3d ed.; 5 John. R. 258, 261; 5 Cowen R. 323; 2 Alk. R. 115.

² Wilson v. Little, 2 Comst. R. 443.

³ Huntington v. Mather, 2 Barb. R. 538. See Parshall v. Eggart, 52 Barb. 367; 54 N. Y. 18; Stenton v. Jerome, 54 N. Y. 480.

⁴ Allen v. Dykers, 3 Hill, 593, and 7 id. 498.

⁵ Langdon v. Buel, 9 Wend. R. 80; 5 John. R. 258; 9 Wend. R. 345; Brown v. Beament, 8 John R. 96; Ackley v. Finch, 7 Cowen R. 290. See Bunacleugh v. Poolman, 3 Daly, 236; ante, § 219.

the possession to remain with the debtor, and providing that on the non-payment of the debt the creditor may take possession, does not prevent the instrument from being treated as a chattel mortgage; and a bill of sale, absolute on its face, if executed as a security for the payment of a debt to become due, is held a mortgage that may be defeated by a payment of the debt when it becomes due.¹ The purport and substance of the contract determine whether it shall be considered a mortgage or a pledge. The delivery of a thing, in part execution of a contract, with a stipulation that it may be redeemed on certain terms within a given time, as by the payment of a stipulated sum of money, creates a pledge.²

§ 248. Both the pledge and the mortgage of goods and choses in action are incident and accessory to the original debt or obligation, for which they are respectively given as a collateral security.³ The assignment of the principal debt draws after it the incident; as, if a note secured by a mortgage be assigned, it carries with it the mortgage of its own force and without any words to that effect;⁴ for it could not continue to exist as an independent security in the hands of one person, while the note belonged to another.⁵ Even where it does not in fact accompany the assignment, the assignee, it seems, is entitled to the aid of the mortgage; so long as that is not extinguished, it may be appealed to in aid of the creditor who holds the original debt.⁶ Separated from the principal debt, it has no determinate value, and is not properly assignable.⁷

The mortgagee of goods or chattels has no occasion, in order to acquire the legal title, to foreclose the equity of redemption; his legal title becomes absolute on the failure of the mortgagor to discharge the conditions of the mortgage. But there is a right of redemption in equity left, which it is necessary to foreclose; for this right of redemption is one that cannot be waived beforehand by any agreement between the parties.⁸ It may, however, be foreclosed, without judicial proceedings, by a sale of the property, as in the case of a pledge, upon reasonable notice to the mortgagor.⁹

¹ 8 John R. 96; *Barrow v. Paxton*, 5 John R. 258.

² *McLean v. Walker*, 10 John. R. 472; *Ogden v. Lathrop*, 1 Sweeny, 643. See review of authorities in *Campbell v. Parker*, 9 Bosw. 322; *Roberts v. Sykes*, 30 Barb. 173.

³ *Jackson v. Blodget*, 5 Cowen R. 202; *Green v. Graham*, 46 N. H. 169.

⁴ *Green v. Hart*, 1 John R. 580.

⁵ *Martin v. Mowlin*, 2 Burr. 978; *Merritt v. Bartholick*, 36 N. Y. 44.

⁶ *Jackson v. Willard*, 4 John. R. 43. See *Lewis v. Varnum*, 12 Abbott Pr. 305.

⁷ *Jackson v. Blodget*, 5 Cowen R. 202; *Powell on Mortg.* 1115.

⁸ 2 Kent's Comm. 583, 3d ed.

⁹ *Patchin v. Pierce*, 12 Wend. R. 61; 2 John. Ch. R. 100; 1 Ves. Sen. 278; *Powell on Mortg.* 1041.

§ 249. The pledge is in no respect an estate resting upon condition; the title to the property does not therefore vest or become perfect in the pledgee by any mere lapse of time. The common law treats it as a security, to be held by the pledgee until the debt is paid; it does not countenance the opinion that the pledge can become forfeited by a failure to pay the debt; on the contrary, it holds that the right to redeem continues in the pledgor until it is legally foreclosed or barred by the statute of limitations¹—a statute which operates upon the remedy of both parties, and does not affect the obligation or binding force of the contract.²

§ 250. The law does not enforce a penalty, stipulated for under the name of liquidated damages;³ and for the same reason it should not enforce a contract by which a debtor delivers property of greater value to secure the payment of his debt, on an agreement that in case he does not pay it on the day it becomes due, the pledge shall become the absolute property of his creditor, the pledgee. The effect of such a contract is to bind the debtor in terms to pay a penalty, equal to the difference between the pledge and the debt, for his failure to fulfill his agreement; and the law does not enforce the contract.⁴ That is to say,

¹ Cortelyou v. Lansing, 2 Caines' Cas. in Error. 200; 9 Albany Law Journal. 184; 2 Kent's Comm. 581, 582; Stearns v. Marsh, 4 Denio, 227; Walter v. Smith, 1 D. & R. 1; 5 B. & A. 439. The statute of limitations begins to run against the right of the pledgor to recover the property pledged to secure future advances from the time the pledge is repudiated by the pledgee. Gilmer v. Morris, 43 Fed. Rep. 456. As to the time within which an action to redeem may be brought, see Roberts v. Sykes, 30 Barb. 173.

² Roberts v. Sykes, 30 Barb. 173; Johnson v. Albany & Susquehanna R. R. Co., 54 N. Y. 416; Quantock v. England, 5 Burr. 2628; Hulbert v. Clark, 128 N. Y. 295.

It is a general rule recognized in this country and in England that where the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred. Hulbert v. Clark, 128 N. Y. 295; Pratt v. Huggins, 29 Barb. 277; Thayer v. Mann, 19 Pick. 535; Hancock v. Franklin Ins. Co., 114 Mass. 155; Shaw v. Silloway, 145 Mass. 503; Joy v. Adams, 26 Me. 330; Belknap v. Gleason, 11 Conn. 160; Ballou v. Taylor, 14 R. I. 277; Spear v. Hartley, 3 Espinasse, 81; Higgins v. Scott, 2 Barn. & Ad. 413; Roots v. Mason City Salt, etc., Co., 27 W. Va. 483; Hudson v. Wilkinson, 61 Texas, 606; Arrington v. Rowland, 97 N. C. 127; Hargreaves v. Igo, 46 N. H. 619; Hambleton v. Glenn, 85 Va. 901; Paxton v. Rich, 85 Va. 378; Jordan v. Sayre, 24 Fla. 1. See Calkins v. Calkins, 3 Barb. 305; S. C. 20 N. Y. 147. And as to the creditor's right to hold the pledge after his debt is outlawed, see Jones v. Merchants' Bank of Albany, 4 Robt. 221, 227; S. C. 6 Robt. 162; Shaw v. Silloway, 145 Mass. 503; Hancock v. Franklin Fire Ins. Co., 114 Mass. 155; Roots v. Mason City Salt, etc., Co., 27 W. Va. 483; Hudson v. Wilkinson, 61 Texas, 606.

³ Bage v. Millard, 12 N. Y. Leg. Obs. 57; Bagley v. Peddie, 16 N. Y. 469; Colwell v. Lawrence, 38 N. Y. 71.

⁴ Gray v. Crosby, 18 John. R. 219.

it does not hold a stipulation valid by which a man engages to pay a greater sum as a penalty for his failure to pay a less sum.¹ No doctrine of the common law is more firmly settled than this.²

§ 251. The rights of the parties in the goods pledged are not changed by the death of either of them, but descend to their representatives. This was held in one of the earliest cases reported, in an action of trover.³ The special verdict stated that the plaintiff had pawned a hat-band, set with jewels, unto one Whitlock, a goldsmith, for twenty-five pounds, and no day was set to redeem. The pawnee on his death-bed delivered the pledge to the defendant, with a request to keep it till the money was paid, and then to deliver it to the plaintiff. The pawnee then died, and the plaintiff tendered the debt to his executor, who refused to receive the money, and then applied to the defendant, and after a demand and refusal brought his suit. The court gave judgment for the plaintiff; and of course decided all the points arising out of the verdict, which were, that the tender to the executor was well made; that by the tender and refusal the special property revested in the plaintiff; that the general property had been constantly in him; that the death of the pawnee did not destroy the right of redemption; that the refusal by the defendant, after tender to the executor, was a conversion, and that the defendant had only the bare custody of the pawn. In delivering the opinion in this case the court observes, extra-judicially, that if the time be limited to redeem, the death of either party, previous to that time, could not prejudice the right; but that if no time was limited, the pawnor had his whole life, and if he died before he redeemed, the right was gone, and his executors could not redeem.

But it is now well settled that on the deposit of a pledge, where no day of redemption is limited, the right of redemption descends to the personal representatives of the pawnor; if the pawnee sell the pledge without notice before application to redeem, he is answerable for the value of the pledge at the time of the application, and it is not necessary in such case to make an actual tender of the balance due.⁴ There is, indeed, absolutely no reason why the death of either party to the contract should affect the right of redemption, or prevent it from descending entire and unimpaired to the representative of the pawnor.⁵

¹ *Kemble v. Farren*, 6 Bing. 141; *Orr v. Churchill*, 1 H. Black. 232; in point, *Lucketts v. Townsend*, 3 Texas R. 119.

² In the early common law practice it was usual to enter a judgment for the penalty, in an action of debt on a bond.

³ *Sir John Ratcliffe v. Davis*, S. Jac. I. in K. B.

⁴ *Caines' Cases in Error*, 200.

⁵ *Henry v. Eddy*, 34 Ill. 508. See *Booth v. Terrell*, 18 Geo. 570; *Farrow v. Bragg*, 30 Ala. 261.

The pledgee can acquire no right of property in the goods bailed by prescription, and the mere lapse of time confers upon him no new right of any kind.

§ 252. While it is true that the mere lapse of time works no change in the right of property, it is also true that a failure for a long time to assert either an equitable or legal right does often impair or defeat the remedy; the right is lost by laches. The action for relief in equity is barred by the statute of limitations, unless it is brought within ten years after it accrues,¹ and it is adjudged that a suit in equity to redeem against a mortgagee in possession does not necessarily accrue when the money secured by the mortgage becomes due; that in equity he has a continuing right to relief from the cloud upon his title, not to be denied him so long as he continues liable to an action of foreclosure.² Aside from this special situation, the action to redeem accrues as soon as it can be brought.³ And the action to redeem a pledge may be brought as soon as the debt it is given to secure becomes due.⁴ Thus interpreted, the statute would operate rather unequally in favor of the party in possession; the pledgee being allowed to hold his security, after the debt to secure which it is given is barred by the statute.⁵

§ 253. The practical application of the statute works more advantageously to the pledgor when he brings a different form of action; such as the action of assumpsit or trover. The contract of pledge is of a continuing nature; it is a species of trust; and the contract is not broken, there is no violation of the trust, so long as the pledgee merely holds the security. It is like an ordinary deposit of money in a bank; the action of assumpsit does not accrue to recover it, until after a demand has been made; or until after a payment or tender of the debt,

¹ *Bell v. Beman*, 3 *Murph. R.* 273, 277. See *Henry v. Tupper*, 29 *Vt.* 358; and see *N. Y. Code of Civil Procedure*, § 388.

² *Miner v. Beekman*, 50 *N. Y.* 337. A proceeding to foreclose lets in the mortgagor to redeem. *Calkins v. Isbell*, 20 *N. Y.* 147. Under the present Code an action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by the mortgagor or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for twenty years after the breach of the condition of the mortgage, or the non-fulfillment of a covenant therein contained. *Code of Civil Pro.* § 379.

³ *Hubbell v. Libbey*, 5 *Lansing*, 51, 58; *Bennett v. Cook*, 45 *N. Y.* 268; *Cleveland Ins. Co. v. Reed*, 24 *How. U. S.* 284; *Waterman v. Brown*, 31 *Penn. St.* 161; and see *Bruce v. Tilson*, 25 *N. Y.* 194. See also, *Coleman v. Second Ave. R. R. Co.*, 38 *N. Y.* 201; and *Wells v. Yates*, 44 *N. Y.* 525.

⁴ *Roberts v. Sykes*, 30 *Barb.* 173; but see post, §§ 321, 322; *Gilmer v. Morris*, 35 *Fed. Rep.* 682.

⁵ *Jones v. Merchants' Bank*, 4 *Rob.* 221; 6 *id.* 162.

⁶ *Downes v. Phoenix Bank*, 6 *Hill*, 297. So where a note has been deposited as

accompanied with a demand for a return of the pledge.¹ A refusal to restore the pledge on a tender of the debt within six years after it becomes due, will support an action of trover brought within six years thereafter.² The action lies if brought within six years after the conversion; and it is clear that the pledgee does not convert the property by continuing to hold it pursuant to the terms of the contract.³ There must be some act of appropriation, inconsistent with the bailee's duty to hold the property as a security, like a wrongful sale.⁴ In replevin or in the action to recover possession of personal property under the Code, permissive possession by the defendant for a long time establishes no defense; it does not tend to establish a title in the defendant; his possession must be adverse, or it cannot ripen into a title. The same principles apply as in the action of trover;⁵ there must be a demand before suit, where it appears that the defendant acquired possession of the goods lawfully.⁶

§ 254. On an ordinary loan of a certain number of shares of stock, one share being just as good as another, it is only necessary to return the same amount of stock in kind. The loan in such a case is in substance a sale, to be repaid in kind and quantity, and the title to the stock loaned is immediately transferred to the borrower; whereas upon a loan of specific articles to be returned in species, the title remains in the lender, and the borrower is only entitled to the temporary use thereof.⁷ But such articles as are capable of being estimated generally by weight, number or measure, do not, when deposited as a pledge, become the property of the bailee, as they do upon a loan of them; because the

collateral for a line of discounts and has been converted into money by the bank, the statute does not begin to run against the right of action for the proceeds of the note before a demand. *Humphrey v. Clearfield Bank*, 113 Pa. St. 417.

¹ See *Payne v. Gardner*, 29 N. Y. 146; 39 Barb. 642; *Sweet v. Irish*, 36 Barb. 467; *Thorpe v. Coombe*, 8 Dow & Ryl. 347.

² *Hoffman v. Van Nostrand*, 42 Barb. 174, 176. It is like an occupation or use with the owner's consent. *Rider v. Union India Rubber Co.*, 28 N. Y. 379.

³ *Roberts v. Berdell*, 61 Barb. 37; *Luckey v. Gannon*, 37 How. Pr. 134; 6 Abbott N. S. 209; *Harvey v. Epes*, 12 Gratt. 153; *Wellington v. Wentworth*, 8 Met. 548. See post, §§ 321-323; *Cortelyou v. Lansing*, 2 Caines' Cases, 200. The action here was one of assumpsit, on a written contract of pledge, the pledge to be delivered upon payment of the principal debt. The statute runs from the time an action for the conversion can be brought. *Bucklin v. Ford*, 5 Barb. 393. See *Murray v. Coster*, 20 John. R. 576, 585.

⁴ *Spaulding v. Barnes*, 4 Gray, 330; *Purdy v. Sistare*, 2 Hun, 126; *Edwards v. Hooper*, 11 M. & W. 363. See *Carroll v. Cone*, 40 Barb. 220.

⁵ *Mayor of New York v. Lent*, 51 Barb. 19; *Gerber v. Monie*, 56 Barb. 652.

⁶ *Sluyter v. Williams*, 1 Sweeny, 215.

⁷ 3 Ersk. Inst. tit. 1, § 18.

pledge is not for use, but merely held as a security. If the pledgee, therefore, sell the pledge without authority, it is a violation of his trust, and he cannot afterwards replace the article sold with others of a like kind and value.¹ But where the contract of pledge permits the pledgee to sell or to hypothecate the pledge and afterwards replace it, with a security of the same kind and value, the agreement is to be enforced according to its terms. If, under a pledge of stocks, the pledgee be authorized to use them as collaterals in his business, he must regain the possession and restore them on demand as soon as the original debt is paid; and unless he does so he is liable for their value.²

§ 255. As one share of stock in a corporation does not differ from another, the identity of a given number of shares can only be traced through the title.³ Hence where stocks are purchased for a customer by a broker, properly in his own name, to be carried on a margin, the agent fulfills his duty by keeping an amount of stock equal to the purchase, ready for delivery to his principal on demand.⁴ Under the contract the broker holds the stock as a pledge;⁵ and he is liable for a conversion of the stock, where he sells the same or appropriates it to his own use unlawfully; and the owner is entitled to recover as damages the market price of the stock at the time of the conversion, or up to the time he might have repurchased the stock, after notice of the sale.⁶ A custom among brokers cannot be appealed to, as an authority to enlarge the power of sale; it can only be resorted to for the purpose of showing what was the understanding or contract between the parties.⁷ And when the contract confers a power of sale in express terms, it must be followed; a departure from the authority will render the sale unlawful.⁸ But though unlawful, the sale will not discharge a surety liable for the principal debt.⁹

¹ *Nourse v. Prime*, 4 John. Ch. 490, and *Dykers v. Allen*, 7 Hill R. 497; *Berlin v. Eldy*, 33 Mo. 426.

² *Lawrence v. Maxwell*, 53 N. Y. 19; *Franklin v. Neate*, 13 M. & W. 481; *Ogden v. Lathrop*, 65 N. Y. 158.

³ *Ketchum v. Bank of Commerce*, 19 N. Y. 499, 511.

⁴ *Horton v. Morgan*, 19 N. Y. 170; 6 Duer, 56; *Marston v. Gould*, 69 N. Y. 220, 226.

⁵ *Markham v. Jaudon*, 41 N. Y. 235; *Stenton v. Jerome*, 54 N. Y. 480.

⁶ *Baker v. Drake*, 53 N. Y. 211. In this case the Court of Appeals reconsiders the rule of damages previously acted upon in like cases in this State, and adopted the rule stated in the text, which latter rule has been since followed. *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368; *Wright v. Bank of Metropolis*, 110 N. Y. 237.

⁷ *Horton v. Morgan*, 6 Duer, 56, 60; S. C. 19 N. Y. 170; *Markham v. Jaudon*, 41 N. Y. 235; *Lawrence v. Maxwell*, 53 N. Y. 19.

⁸ *Stenton v. Jerome*, 54 N. Y. 480.

⁹ *Yose v. Florida R. Co.*, 50 N. Y. 369. If the avails of the sale be sufficient to pay the debt, the surety is discharged. *Strong v. Wooster*, 6 Vt. 536.

§ 256. The rights of the parties may be further illustrated by the rule prescribing the demand necessary to charge the indorser of a note secured by collaterals. The maker having deposited railroad bonds to secure the payment of the note, has a right to demand their surrender when called upon to pay the note; and if he offers to pay on their surrender, being ready and willing to do so, and the collaterals be not tendered to him, the demand is ineffectual to charge the indorser.¹ A sale of the collaterals, with authority, before the note becomes due, changes the relation of the parties; the purchaser acquires the pledgor's title discharged of the trust.² Hence, a demand of payment after the sale will be valid, without a transfer of the collaterals.

§ 257. Where the pledgee sells the collaterals prematurely, or without authority, and afterwards brings an action to recover the debt secured, the defendant is entitled to have the value of the pledge wrongfully sold, deducted from the amount of the plaintiff's demand; he is not bound to accept the price received on the illegal sale.³ And where the pledge wrongfully sold exceeds in value the amount of the debt, the pledgor may maintain an action to recover the value of the things pledged, or their value at the time of the sale; and in this action the defendant is entitled to set off or recover the amount of the debt due to him.⁴ A tender of the debt need not be made before the suit is brought.⁵ The pledgor has a right to recover in an action on the contract of pledge; and

¹ *Ocean National Bank v. Fant*, 50 N. Y. 474. The action was brought against the indorser of a note in these terms:

\$3,352.61.

NEW YORK, October 15, 1869.

On demand I promise to pay to Hamilton G. Fant or order \$3,352.61 for value received, with interest at the rate of seven per cent. per annum, having deposited with him as collateral security, with authority to sell the same at the broker's board, or at public or private sale, or otherwise at his option, on the non-performance of this promise and without notice, one land grant bond of the Union Pacific Railroad Company, Eastern Division, of the par value of \$1,000, and four Construction Bonds "Series B" of the said Union Pacific Railroad Company, convertible into the land grant bonds of the same description as the one first named, and all of the par value of \$1,000 each, said bonds being deposited with Ocean National Bank.

JOS. B. STEWART.

A note of this kind remains negotiable, notwithstanding the addition to it of the contract of pledge. *Fancourt v. Thorne*, 58 Eng. Com. Law, 610.

² *Lewis v. Mott*, 36 N. Y. 395.

³ *Stearns v. Marsh*, 4 Denio, 227. See *Capron v. Thompson*, 86 N. Y. 418; *Gruman v. Smith*, 81 N. Y. 25; *Cass v. Higenbotam*, 100 N. Y. 248.

⁴ *Allen v. Dykers*, 3 Hill, 593; *S. C.* 7 Hill, 497; *Wilson v. Little*, 2 N. Y. 443; *New York, etc., R. R. Co. v. Davies*, 38 Hun, 477; *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Maryland, etc., Ins. Co. v. Dalrymple*, 25 Md. 242; *Baltimore, etc., Ins. Co. v. Dalrymple*, 25 Md. 269; *Treadwell v. Davis*, 34 Cal. 601; *Fisher v. Fisher*, 98 Mass. 303.

⁵ The current of authorities is to this effect, and the Special Term decision in *Butts v. Burnett*, 6 Abbott Pr. R. (New Series), 302, was hardly intended to change the rule.

the pledgee, though liable in damages for a breach of the contract, is permitted to set off his demand in the action.¹ And the pledgor cannot prevent this by bringing an action of trover; he cannot by merely changing the form of his action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction.² The plaintiff recovers his damages, namely, the value of the property, less his debt.³

In trover by a lienholder, against the general owner or against any one claiming under him, the plaintiff recovers the value of his interest in the goods; this rule is well settled.⁴ Against a stranger he recovers their full value.⁵

§ 258. We have seen that a legal sale, or a sale made with authority, transfers the title to the collaterals.⁶ What is the effect of an unauthorized sale by the pledgee, on the title to the things pledged? In a transfer of stocks, where the pledgee is entrusted with the title, the purchaser paying value in good faith, will certainly acquire the title, disencumbered of the trust; because here the owner invests the pledgee with the title, and arms him with written authority to transfer the property. And the effect is the same where the pledgor entrusts the pledgee with a blank power of attorney, to make the transfer on the books of the corporation.⁷ The purchaser naturally relies upon the indicia of title, and is entitled to the property where he buys it in good faith, from a party holding a written power to transfer it.⁸ Considered as a mere agent, the pledgee has authority to sell under certain circumstances; and the

¹ The defense may be set up under the Code as a counterclaim. *Seaman v. Reeve*, 15 Barb. 454; *Johnson v. Stear*, 15 Com. B. (N. S.) 338; *Hart v. Miller*, 17 Gratt. 187; *Lane v. Bailey*, 47 Barb. 395. Where the plaintiff pledged a watch to secure the payment of a debt he was owing, and the defendant obtained possession of it in right of the pledgee and sold it prematurely, and received for it other property; it was held the plaintiff could not recover in assumpsit for money had and received. *Kidney v. Persons*, 41 Vt. 386.

² *Md. Fire Ins. Co. v. Dalrymple*, 25 Md. 242; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269, 309; *Seaman v. Reeve*, supra; *Brierly v. Randall*, 17 Q. B. 937; *Chinery v. Viall*, 5 Hurl. & Nor. 288.

³ *Parish v. Wheeler*, 22 N. Y. 494, 511, 515; *Manning v. Monaghan*, 28 N. Y. 585; *Chadwick v. Lamb*, 29 Barb. 518; this case overruled on another point, 35 N. Y. 277; 42 N. Y. 324.

⁴ *Spoor v. Holland*, 8 Wend. 445; *Russell v. Butterfield*, 21 Wend. 300, 303. See *Allen v. Judson*, 71 N. Y. 77; *Fowler v. Haynes*, 91 N. Y. 346.

⁵ *Alt v. Weidenberg*, 6 Bosw. 176.

⁶ Ante, § 256.

⁷ *In re Tahiti Cotton Co.*; *Ex parte Sargent*, 7 English R. 813; Law Rep. 17 Equity Cases, 273.

⁸ *Crocker v. Crocker*, 31 N. Y. 507; *Dillaye v. Com. Bank of Whitehall*, 51 N. Y. 345.

facts justifying the sale are peculiarly within his knowledge; his position is not unlike that of a factor, under instructions limiting the price at which he may sell the goods in his hands; and though he violates his instructions or departs from the understanding under which he holds the property, a sale made by him in the usual course of business is valid.¹ The form of the transaction shows a clear intent to place the stock under the control and at the disposal of the pledgee; and it is noticeable that the remedy usually chosen in these cases assumes that the transfer is effectual, though unauthorized in the actual situation of the parties;² and such is at length the settled understanding of the law.³

§ 259. At common law, goods pawned or pledged, are not liable to be taken in execution in an action against the pledgor.⁴ The possession of the pledgee could not be disturbed, because the officer could acquire no greater interest in or control over the property than that possessed by the defendant, against whom he held the process of the court. And as public sales of personal property, not within the view of the bidders at the sale, were declared void by judicial decisions, on the plainest grounds of public policy, it became extremely difficult to sell even the pledgor's interest in the property on execution.⁵ Where the property was so situated that it could be brought within the view of the bidders, it seems, property in the nature of a pledge might be sold on execution, but not so as to defeat the interest of the pledgee.⁶ The interest of the bailor could be sold, but the possession of the bailee having a lien or special property in the goods levied upon could not be disturbed; there could be, in fact, no taking or actual seizure under the execution.⁷ Hence it frequently happened that the pledging, of many kinds of personal property, operated to place them beyond the reach of an execution; and this induced the passage of the statute in this State, authorizing a sale of the pledgor's right or interest in the goods or chattels pledged for

¹ *Little v. Barker*, 1 Hoff. Ch. R. 487; *Fatman v. Lobach*, 1 Duer, 354; *Leavitt v. Fisher*, 4 Duer, 1, 20; *Kortright v. Com. Bank of Buffalo*, 22 Wend. 348, 360; *N. Y. & N. H. Railroad Co. v. Schuyler*, 34 N. Y. 30, 80; *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 270. See *Ballard v. Brugett*, 40 N. Y. 314.

² *Wilson v. Little*, 2 N. Y. 443; *Romaine v. Van Allen*, 26 N. Y. 309. See *Moore v. McKibben*, 33 Barb. 246; *Sargent v. Blunt*, 16 John. 74; and *Scott v. Rogers*, 31 N. Y. 676.

³ *McNiel v. Tenth Nat. Bank*, 46 N. Y. 325; *Moore v. Met. Nat. Bank*, 55 N. Y. 41.

⁴ *Wilkes v. Ferris*, 5 John. R. 336; *Marsh v. Lawrence*, 4 Cowen R. 461; *Baillam v. Tucker*, 1 Pick. 389; *Pomeroy v. Smith*, 17 Pick. 85; *Scott v. Sholey*, 8 East, 467; *Metcalf v. Scholey*, 5 Bos. & Pull. 461.

⁵ *Linnendoll v. Doe and Terhune*, 14 John. R. 222; *Sheldon v. Soper*, id. 352; *Cresson v. Stout*, 17 John. R. 116.

⁶ *Moore v. Hitchcock*, 4 Wend. R. 292; *Wheeler v. McFarland*, 10 Wend. R. 318.

⁷ *Reynolds v. Shuler*, 5 Cowen R. 323; 7 Cowen R. 735 and 670.

the payment of money, or for the performance of any contract or agreement.¹

Under this statute the question was seriously litigated whether the sheriff, holding an execution against the pledgor, may by virtue thereof take the property pledged out of the hands of the pledgee into his own possession, for the purpose of selling the interest of the pledgor therein. And it was held, first, that the right and interest of the pledgor cannot be sold on execution unless the goods be present and within the view of those attending the sale;² that for the purpose of the sale the sheriff may under this statute seize and detain the goods in the same manner as if they were not under pledge, but that he must sell them subject to the lien of the pledgee; and that after the sale he must hold them in the custody of the law to await a redemption by the purchaser. If not redeemed presently, the sheriff must then deliver them again into the custody of the pledgee, to whom the purchaser must look for them. The effect of such a sale under the statute is to vest in the purchaser the precise right and interest of the pledgor. Afterwards the purchaser may of course redeem upon the same terms.³

¹ *Bailey v. Burton*, 8 Wend. R. 339; 2 R. S. p. 464, 3d. ed. This statute is substantially re-enacted in section 1412 of the Code of Civil Procedure.

² *Blackwell v. Ellsworth*, 6 Hill R. 484; *Franklin's Case*, 5 Rep. 47. See *Tift v. Barton*, 4 Denio, 171.

³ *Stief v. Hart*, 1 N. Y. 20. Legislation recognizes the rights of both parties, and protects them in different ways.

MAINE.—A creditor may attach personal property held under a mortgage or pledge and sell the same, provided he first pays or tenders the amount due to the pledgee or mortgagee; and he may take first from the proceeds of the sale the amount paid to redeem. R. S. of Maine of 1871, page 623. The same rule holds where an officer sells on execution. *Id.* 669. The statute applies where there exists a valid lien by a pledge or mortgage. *Birch v. Roberts*, 50 Maine R. 395. The levy or attachment may precede the tender or payment, under the statute. *Barrows v. Turner*, 50 Maine, 127.

MASSACHUSETTS.—The debtor's personal property may be attached and held as if it were unincumbered; but the attaching creditor must within ten days pay or tender to the pledgee, mortgagee, or lienholder the sum for which the property is held; *i. e.*, ten days after a demand made by the lienholder, with a written statement of the amount claimed. Unless the creditor pays or tenders the amount due, the attachment is to be dissolved, and the property restored. Gen. Statutes of 1860, pp. 627, 727. The law requires a payment of the lienholder's demand according to the statement required by the statute; and the statement must be made within a reasonable time. *Simonds v. Parker*, 3 Met. 144; *Johnson v. Sumner*, 1 Met. 172, 294, 325, 515. No technical strictness is required by the lienholder in pointing out the parcels of the property covered by the lien. *Averill v. Irish*, 1 Gray (Mass.), 254. If a mortgagee intends to rely upon the remedy given by the statute, he must not assume to dispose of any part of the goods after the attachment is levied. He is entitled to his debt, and the attaching creditor is entitled to the property. *Granger v. Kellogg*, 3 Gray, 490.

NEW HAMPSHIRE.—"Any personal property not exempt from attachment, subject

§ 260. It is to be noticed that the effect of a sale on an execution against the pledgor is not in any respect to vary the terms of the con-

to any mortgage, pledge, or lien, may be attached as the property of the mortgagor, pledgor, or general owner;" the officer or creditor paying or tendering the amount for which the same is held. The officer or attaching creditor has a right to demand of the pledgee or lienholder an account on oath of the amount of the debt for which the property is held; and unless the same is given within fifteen days, and given honestly, the lien is held discharged. General Statutes (1867), pp. 417, 418, §§ 17, 18. A true and fair account satisfies the statute. *Barton v. Chellis*, 45 N. H. 135. Personal property may be sold on execution against the mortgagor or pledgor in the same manner as it may be attached; and where the officer or creditor pays the debt secured, he is entitled to apply the proceeds of the sale to pay the amount so paid in order to release the property, and the balance on the execution. Gen. Statutes, p. 441. The theory of the statute is that the pledgee or lienholder is entitled to be protected in his rights; and that he cannot be disturbed in his possession otherwise than is allowed by statute. *Briggs v. Walker*, 21 N. H. 72. A trustee process does not prevent the pledgee from proceeding to a sale. *Chapman v. Gale*, 32 N. H. 141.

VERMONT.—Personal property held by any one as lessee, bailee, pledgee, or by virtue of any contract establishing a reversionary interest or title, may be attached and levied upon as the property of the lessor, bailor, pledgor, or person owning the reversionary interest, subject to the title or interest of the lessee or pledgee; and the reversionary interest may be sold. General Statutes (1862), 2d ed. Appendix, 1870, pages 293, 294.

PENNSYLVANIA.—The statute allows a sale of goods or chattels held as a pledge, on execution, subject to the rights and interests of the pledgee or pawnee, bailee or lessee. 1 *Brightly's Purdon's Digest*, 635. Under the statute the practice is to allow, on motion, an execution to sell the pledgor's interest; so allowed where stocks were held as a pledge or security. *Freeman v. Simons*, 7 Phila. R. 307.

NEW YORK.—The terms of the statute allow a sale of the defendant's interest on an execution against the pledgor, and provide that the purchaser shall acquire that interest or right, and shall be entitled to the possession of the goods or chattels on complying with the terms and conditions of the pledge. 3 R. S. 645, 5th ed. The statute does not authorize anything adverse to the rights or the interest of the pledgee; *Bakewell v. Ellsworth*, 6 Hill, 484; and it makes no provision for a sale of the interest of a mortgagor of chattels; it leaves that under the rule of the common law. *Hull v. Carnley, sheriff*, 11 N. Y. 501, 505. The new Civil Code of Procedure of New York has the following, § 1412: "The interest of the judgment debtor in personal property, subject to levy, lawfully pledged, for the payment of money, or the performance of a contract or agreement, may be sold, in the hands of the pledgee, by virtue of an execution against property. The purchaser at the sale acquires all the right and interest of the judgment debtor, and is entitled to the possession of the property, on complying with the terms and conditions upon which the judgment debtor could obtain possession thereof. This section does not apply to property of which the judgment debtor is unconditionally entitled to the possession." Judging from the marginal note, this section is not intended to change the effect of the previous statute; this note is in these words: "Interest of bailor in goods pledged may be sold."

MICHIGAN.—The statute allows a sale on execution of goods or chattels pledged by way of mortgage or otherwise to secure the payment of money or the performance of any contract, subject to the lien; and permits the purchaser to pay the amount secured

tract of pledge.¹ If the pledge be made to secure the payment of a sum of money to fall due at some future time, or to secure the pledgee against a conditional liability that may or may not accrue against him, and which cannot be determined at the time of the sale, it is manifest that the goods pledged must abide the terms of the contract under which the pledgee holds them. The purchaser's right of redemption is the same exactly, and dependent upon the same terms and conditions as that of the pledgor.² He is entitled to possession of the goods, on complying with the terms and conditions of the pledge; and when these cannot be complied with until some future event has occurred, the pledge must of course be redelivered into the hands of the pledgee.

§ 261. This statute, in common with the statute law of neighboring States, concedes to the officer rights over the pledged goods which the defendant in the execution could not exercise; it allows him to levy upon and seize the goods at a time when the pledgor has neither the possession, nor any right of control over them—action to be justified only on the ground of public policy. To prevent frauds, the law allows a sale of the pledgor's interest, and also provides that the sale of personal property shall be made in such a manner that the same may be inspected, and may sell to advantage.³ By necessary implication, the

or fulfill the contract at any time before the actual foreclosure of the mortgage or pledge. 2 Compiled Laws, 1871, page 1741. The lienholder's rights and interests are protected equally under proceedings by garnishment. *Id.* 1819.

Independent of the statute, the interest of a mortgagor of chattels not entitled to hold them for any definite time, cannot be levied on and sold under an execution; he has no legal or vendible interest. *Eggleston v. Munday*, 4 Mich. (4 Gibbs) 295. A payment in any manner of the debt secured by a chattel mortgage, extinguishes the title held by the mortgagee. *Place v. Grant*, 9 Mich. (5 Cooley) 42. All property pledged as security for a debt reverts to the original owner upon the extinguishment of the debt. *Merrifield v. Baker*, 9 Allen (Mass.), 29.

¹ *Stief v. Hart*, 1 N. Y. 20. Stief brought replevin against Hart, sheriff, for a quantity of goods which defendant had levied upon and taken on execution; on the trial it appeared that the plaintiff held them in pledge, and that the sheriff took the goods from his custody on an execution against the pledgor; and the circuit judge charged the jury that the sheriff had a right so to take the property into his possession in order to sell the pledgor's interest therein. Plaintiff excepted, and moved the Supreme Court for a new trial; the motion was denied, and the Court of Appeals affirmed the judgment of the Supreme Court by a vote of four to four. It will be noticed that under the Code provision the pledged property may be sold "in the hands of the pledgee." Code of Civil Pro. § 1412.

² *Bakewell v. Ellsworth*, 6 Hill R. 484; 2 R. S. 464, § 20, 3d ed.

³ "§ 20. When goods or chattels shall be pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and shall be entitled to the

statute allows the officer to take and expose the goods for sale.¹ It authorizes the sale, and it prescribes the manner in which the officer must sell. It goes no farther; it does not authorize him to deliver the goods to the purchaser; it only declares the purchaser's right to the possession, on complying with the terms and conditions of the pledge. He takes therefore by his purchase the equity of redemption, and nothing more; the same as a purchaser of property covered by a chattel mortgage.² With this difference, on a sale of the mortgagor's interest in goods, where he has a right to the possession of them for a definite period, the goods may be delivered to the purchaser.³

There are other cases in which the law clothes the officer with rights superior to those of the defendant in the execution. Where one of two partners has the actual possession of the partnership property, the officer with an execution against the other partner is armed with an authority to seize the partnership goods, and to use force if necessary to take them into his custody; and that not merely for the temporary purpose of effecting a sale and then restoring the possession, as in the case of pledged goods; but the sheriff is authorized to deliver the possession to the purchaser. In order to make a sale of the interest of the defendant in the execution, he has the right to levy upon and take the goods into his possession—a greater exercise of power than the law accords to that defendant himself.⁴

§ 262. It is the duty of the sheriff to offer the property for sale in such lots and parcels as shall be calculated to bring the highest price; and in the fulfillment of this duty, it is proper for him to sell several articles and different kinds of property, covered by a chattel mortgage, in one parcel; for unless one man purchases the whole, he cannot acquire the equity of redemption; there being no legal way of apportion-

possession of such goods and chattels, on complying with the terms and conditions of the pledge." 3 R. S. 645, 5th ed. N. Y. The mode of sale is the same as in other cases. *Id.* 648.

¹ *Bakewell v. Ellsworth*, 6 Hill, 484; *Stief v. Hart*, 1 N. Y. 20; *Williams v. Amory*, 14 Mass. 27.

² *White v. Cole*, 24 Wend. 116, 141; *Bakewell v. Ellsworth*, 6 Hill, 484; *Wheeler v. McFarland*, 10 Wend. 318.

³ *Hull v. Carnley*, 11 N. Y. 501. It is criminal in the mortgagor to sell the goods with intent to defraud a mortgagee or purchaser. N. Y. Laws of 1871, Ch. 77.

⁴ *Phillips v. Cook*, 21 Wend. 389; *Melville v. Brown*, 15 Mass. 82; *Wadell v. Cook*, 2 Hill, 47. The judgment being recovered against a partner for his individual debt the sheriff can only sell the defendant's interest. *Walsh v. Adams*, 3 Denio, 125; *Berry v. Kelly*, 4 Robt. R. 106, 123. The interest of a special partner in a limited partnership cannot be sold on execution. *Harris v. Murray*, 28 N. Y. 574. For the release of the partnership property from the levy under an execution against the individual property of a partner, see Code of Civil Procedure, §§ 1413-1417.

ing the lien of the mortgage relatively upon the different parcels of property.¹ A sale in parcels to different parties, therefore, tends to a sacrifice of the property and is injurious to the mortgagor; it is also in some cases very prejudicial to the mortgagee, dispersing and placing the property beyond his reach. On both accounts it ought to be sold in mass, and subject to the lien.²

The same rule must hold good on a sale of personal property subject to the pledgee's lien. If we assume that the things pledged are about equal in value to the debt they are held to secure, it is evident that on a sale of them in different parcels to different persons, they will scarcely be vendible at any price; because no single purchaser can afford to redeem the pledge, and the law does not enable him to redeem it in part. The things pledged must therefore be sold in one parcel, subject to the lien.

§ 263. We may often ascertain the interest of the parties from the rule defining what may be levied on and sold under execution. Personal property pledged by way of a mortgage may, after forfeiture, be levied upon by virtue of an execution against the mortgagee, although it remains in the hands of the mortgagor.³ A mere chose in action cannot be levied upon and sold on execution.⁴ Bonds, notes, shares of stock, and property of that nature cannot be seized and taken in execution by the sheriff;⁵ neither can a mere equity in the proceeds of personal property be sold on execution.⁶ But when the mortgagor of a chattel has a right to redeem and a right to the possession for a definite period before the property can become forfeited, he has such an interest as may be sold on execution.⁷ The purchaser in such cases takes the property subject to the incumbrance; he purchases the right of the mortgagor, which is a right to the possession and absolute ownership, subject to the incumbrance; but if the mortgage at the time of the sale on execution has been forfeited, the mortgagor has no longer the right of

¹ *Tift v. Barton*, sheriff, 4 Denio, 171.

² *Manning v. Monaghan*, 23 N. Y. 539, 544; S. C. 28 N. Y. 585.

³ *Ferguson v. Lee*, 9 Wend. R. 258. See also, 4 Denio R. 171; *Mattison v. Baucus*, 1 N. Y. 295. It cannot be taken under an execution against the mortgagor. *Leadbetter v. Leadbetter*, 125 N. Y. 290; *Manchester v. Tibbetts*, 121 N. Y. 219.

⁴ *Ingalls v. Lord*, 1 Cowen R. 240.

⁵ *Denton v. Livingston*, 9 John. R. 97. Bank notes or bills may be levied on as money; *Handy v. Dobbin*, 12 John. R. 220, 395; but not as the money of a party for whom an officer has collected it, until paid over. *Dubois v. Dubois*, 6 Cowen, 494; *Betts v. Hoyt*, 19 Barb. 412; 14 How. Pr. 477.

⁶ *Hendricks v. Robinson*, 2 John. Ch. R. 296.

⁷ *Bailey v. Burton*, 8 Wend. R. 339; *Marsh v. Lawrence*, 4 Cowen R. 461; *Otis v. Wood*, 3 Wend. R. 500; *Champlin v. Johnson*, 39 Barb. 606.

possession; all the right he then possesses is an equity, which cannot be thus sold. So where it is a condition in a lease of personal property that the lessee shall keep it upon particular premises, and not remove it therefrom, a removal of such property by the lessee operates as a forfeiture of the term and divests his title, so that no interest in the property removed remains in him that can be sold on execution; because by the forfeiture the title is vested in the lessor with the right of immediate possession.¹ The established principle is that a person in possession of a chattel, having a right to such possession for a specific time, has an interest which may be sold; and when that interest expires the owner is entitled to his goods and may bring an action for them. The officer sells only the interest of the party in possession; and even though he assumes to sell the absolute property in the goods, the purchaser will acquire no greater right in them than that possessed by the defendant in the execution.²

§ 264. Is the pledgee's interest in the things pledged such that it can be levied upon and sold under an execution against him? His right to them inheres in the debt they are held to secure; he has no right to derive from them any benefit accruing from the use of them; separate from the debt, he has no vendible interest in them; and the debt itself is a chose in action, not capable of sale under an execution. The debt being due, the pledgee has no interest in the goods pledged for any definite period; he holds them subject to the owner's call, on payment of the debt.³ Hence a sale of his interest on execution will not avail the purchaser unless it carries with it the debt, which is the basis of his interest; and to give the sale that effect would indirectly authorize the sale of a chose in action under an execution.

The theory that the pledgee's lien may be severed from the debt, so that the debt may be owned by one man and the lien held by another, is fraught with many difficulties. His property in the goods is special and qualified; it is not a distinct and independent right of property; it is a lien, a collateral security; it is not in its nature capable of separation from the original debt. It is no more capable of being separately sold than a mortgage given as collateral security for the payment of a bond; only the mortgage declares on its face its ancillary character.

¹ 3 Wend. R. 498. In *McCracken v. Luce*, not reported, it was held, that a mortgagor of a canal boat, in possession and having the right of possession for a certain time, had an interest which was the subject of sale on execution.

² *Van Antwerp v. Newman*, 2 Cowen R. 543.

³ In *Saul v. Kruger*, 9 How. Pr. 569, the Superior Court of New York hold that the pledgee's interest may be levied upon and sold on execution; and in *Felt v. Hege*, 23 How. Pr. 359, 362, the Supreme Court expresses a contrary opinion.

The bond is the principal debt; the mortgage is only an incident to it; a transfer of the principal debt carries with it the incident; but the incident is not capable of being transferred separate from the original debt.¹

§ 265. On the death of a pledgee, his interest in the pledge passes to his legal representatives, together with the debt to secure which it is held. The debt passes by operation of law, and the possession of the pledge accompanies it; the bailee's death does not otherwise work any change in the right of property, or in the duties resulting from the contract of pledge. Equally on the death of the pledgor, his title and rights pass to his legal representatives; his personal estate vests in them, including the things pledged, subject to existing liens; no security or right of property is gained or lost by the pledgor's death.²

§ 266. It is not essential that the bailee or lienholder should retain the pledge or collateral security in his personal custody; he does not lose his lien by delivering the property to his agent or servant to hold for him, with notice of his lien. In other words, there is nothing strictly personal in the contract of pledge; there is nothing in the agreement requiring the pledgee's personal care over the property. He may therefore store the goods or keep them in the usual manner.³ And the contract not being of a personal nature, there is nothing to prevent the lienholder from transferring his demand with the security which he holds for its payment; and no rule of law to prevent his transferring both as a pledge or security for a debt of his own provided he does not assume to transfer any more than his true interest. The original pledgor is not harmed so long as his right to redeem remains unaffected.⁴

§ 267. The pledgor has a remedy for any breach of the contract on

¹ *Merritt v. Bartholick*, 47 Barb. 253; S. C. 36 N. Y. 44. A pledge, like a mortgage, is intended to accompany and secure the principal debt. The pledge gives a lien; so does the mortgage; by this lien the property is held to pay the debt. An absolute transfer of the bond and mortgage to the mortgagor, the owner of the premises, extinguishes the lien. *Angel v. Boner*, 38 Barb. 425; *Moore v. Hamilton*, 48 Barb. 120; S. C. 44 N. Y. 666.

² *Cortelyou v. Lansing*, 2 Caines' Cas. 200; *Webb v. Cowdell*, 14 Mees. & Wels. 820; *Morgan v. Ravey*, 6 Hurl. & Nor. 265; *Henry v. Eddy*, 34 Ill. 508; *Middlesex Bank v. Minot*, 4 Met. 325. The rule applies to all contracts except those which involve or depend upon the personal skill of the deceased. *Wills v. Murray*, Exch. R. 866.

³ *Urquhart v. McIver*, 4 John. R. 103: holds that a factor may thus preserve his lien. See also, *Laussat v. Lippincott*, 6 Serg. & Rawle, 386; and *Ingersoll v. Van Bokkelen*, 7 Cowen, 670, 680.

⁴ *Nash v. Mosher*, 19 Wend. 431; *Jarvis v. Rogers*, 15 Mass. 408; *Whitaker v. Sumner*, 20 Pick. 399, 406; *Moore v. Conham*, Owen, 123; *Racliffe v. Davis*, 1 Buls. 29; *McCombie v. Davies*, 7 East, 7; *Bullard v. Billings*, 2 Vt. 309; *Duncomb v. New York, H. & N. R. R. Co.*, 84 N. Y. 190, 208.

the part of the bailee; he may reclaim the goods pledged, where they have been transferred in violation of the trust. He cannot maintain an action of trespass against a purchaser to whom the bailee wrongfully sells and delivers them, because here he cannot establish a wrongful taking of the property; his true remedy is by a suit in equity against the pledgee and his assignee to redeem, or by an action of trover for the goods, after a demand and refusal¹—an action in which the defendant should be permitted to limit the plaintiff's recovery to the value of the goods, after deducting the amount of the debt to secure which they were pledged.² A purchaser in good faith should certainly be allowed this degree of protection; otherwise the plaintiff will recover more than he is entitled to, at the expense of an honest purchaser.³

Vested with express authority to sell or transfer stocks or debentures on a failure to pay the debt or demand for which they are held as a security, the pledgee is liable in damages for a breach of the contract, where he sells before any default or demand of payment is made; but his unauthorized sale or transfer does not put an end to the contract of pledge; it does not of itself give the debtor an immediate and unconditional right to reclaim the pledge.⁴ On the contrary, a *bona fide* purchaser of the pledge acquires an interest in it which cannot be taken from him, without tendering to him the amount due on the pledge.⁵

§ 268. The owner of securities or of goods and chattels held in pledge may transfer his interest in them subject to the lien. He cannot complete the sale of goods thus situated by an actual delivery; but he can sell and transfer the title, so that the purchaser will be entitled to them on a payment or tender of the amount for which they are held.⁶ In order to render a sale of them valid under the statute of frauds by a

¹ Dudley v. Hawley, 40 Barb. 397, and cases there cited: S. C. Sprights v. Hawley, 39 N. Y. 441; Rogers v. Weir, 34 N. Y. 463. See Durant v. Einstein, 35 How. Pr. 223.

² Lewis v. Varnum, 12 Abbott Pr. 305.

³ Ante, § 257.

⁴ Donald v. Suckling, Law Rep. 1 Q. B. 585. Pledge of debentures as security for an indorsed note, with power to sell on default, and the pledgee again pledged the same before a default for a larger demand; held in detinue that the repledge did not put an end to the contract of pledge, and that the first pledgor could not recover without having paid or tendered the amount of the note. Halliday v. Holgate, Law Rep. 3 Ex. 299. A sale of a pledge, scrip of stock, before a demand of the debt, assuming it to be wrongful, does not give the pledgor an immediate right to the possession of the shares; he cannot maintain trover for them without first making a tender of the debt. New York, L. E. & W. R. R. Co. v. Davies, 38 Hun, 477, 480.

⁵ Talty v. Freedman's Savings & Trust Co., 3 Otto, 321; Lewis v. Mott, 36 N. Y. 395.

⁶ Bush v. Lyon, 9 Cowen, 52; or where the lien is waived; Bailey v. Adams, 14 Wend. 201, 203; the goods cannot be taken, nor the value of them recovered in trover until the lien has been discharged. Wood v. Orser, 25 N. Y. 348.

delivery, the bailee must consent to hold them subject to the buyer's order; he must attorn to the purchaser.¹ But where the sale is in writing, or valid under the statute without a delivery, the consent of the bailee is not required; the purchaser may demand the goods as a matter of right on complying with the terms of the pledge.² The pledgee's position does not enable him to prevent a transfer which leaves his rights unaffected.

§ 269. The rule is that a bailee must retain possession of the goods, in order to preserve his lien upon them.³ Various exceptions have been allowed to this rule; as where a pledge is delivered back to the owner for a temporary purpose, on a promise to restore it;⁴ or where it is handed back to the owner for some special purpose, to be returned as soon as the purpose has been fulfilled.⁵ The pledgee of a bond, who hands it back to the pledgor to exchange it for and substitute stock in lieu of it, does not part with his interest.⁶ And the holder of notes as collateral security does not relinquish his interest in them by giving them to the pledgor to collect or to receive the money upon them.⁷ In these and like cases the pledgor receives back the things pledged in a new character, on a special trust; and this trust is one which the law will always enforce in suits between the parties, and against third persons where the transaction is fair and reasonable.⁸ The pledgor thus receiving back the pledge holds it as a special bailee, and is bound by the trust, on the same ground as an ordinary bailee.⁹ He is equally liable, where he wrongfully obtains the custody or control of the goods.¹⁰ He is liable in an action of trover or replevin.¹¹

¹ *Dixon v. Buck*, 42 Barb. 70; *Potter v. Washburn*, 13 Vt. 538; *Barrows v. Harrison*, 12 Iowa, 588; *Biddle v. Bend*, 6 Best & Smith, 225; *Feltzplace v. Dutch*, 13 Pick. 388.

² *Anthony v. Wheatons & Whitford*, 7 R. I. 490; *Carter v. Willard*, 19 Pick. 1; *Plessant v. Pendleton*, 6 Randolph, 478.

³ *Homer v. Crane*, 2 Pick. 607; *Jarvis v. Rogers*, 15 Mass. 389.

⁴ *Roberts v. Hyatt*, 2 Taunt. 266; *Hutton v. Arnett*, 51 Ill. 198; *Way v. Davidson*, 12 Gray (Mass.), 465; *Cooper v. Ray*, 47 Ill. 53; *Cahn v. Ford*, 42 La. Ann. 965.

⁵ *Macomber v. Parker*, 14 Pick. 497.

⁶ *Hays v. Riddle*, 1 Sandf. 248.

⁷ *White v. Platt*, 5 Denio, 269; *Bank of State of N. Y. v. Vanderhorst*, 1 Robt. 211, 220; 32 N. Y. 553.

⁸ *Cooper v. Ray*, 47 Ill. 53; *Jones v. Baldwin*, 12 Pick. 316; *Reeves v. Capper*, 5 Bing. N. C. 136.

⁹ *White v. Platt*, 5 Denio, 269; *Way v. Davidson*, 12 Gray, 465; *Coleman v. Shelton*, 2 McCord (S. C.) Ch. 123; *Cooper v. Ray*, 47 Ill. 53; *Hutton v. Arnett*, 51 Ill. 98; *Thayer v. Dwight*, 104 Mass. 254. See ante, § 223.

¹⁰ *Walcott v. Keith*, 2 Foster, 196.

¹¹ *Ingersoll v. Van Bokkelen*, 7 Cowen, 670; *Rogers v. Arnold*, 12 Wend. 30; 7 N. Y. 555. A surrender of the pledge with intent to abandon the lien puts an end to the

§ 270. In an action by the pledgee against the pledgor for the conversion of a bond, the measure of the plaintiff's damages is the value of the bond, with interest from the time of the conversion, unless such amount exceeds the sum due to the pledgee; in which case that sum is the proper measure of damages—that sum being the exact measure of his interest in the security.¹ As against a third person tortiously appropriating or converting a chose in action, the pledgee recovers the value of the security; *prima facie* he recovers the face of the bond, bill, or note.² In this action of trover, the plaintiff need not give the defendant notice to produce the note or bond; bringing the suit is a sufficient notice. But the plaintiff must in his complaint set forth or describe the instrument with reasonable precision.³ A slight variance between the proof and the complaint will not be regarded as material.⁴

§ 271. It is the duty of the bailee to keep the things pledged separate from his own; and if he blends or so confounds them with his own that they cannot be distinguished, he must bear all the inconvenience of the confusion; if he cannot distinguish and separate his own, he must lose it—a rule which is perfectly just, where the bailee's misconduct admits of no other adjustment.⁵ The owner may also follow and reclaim his goods from a party receiving them wrongfully and with knowledge.⁶ He may follow and reclaim them when transferred to a party receiving them in bad faith, from a trustee invested with a power of sale; *e. g.*, when the transfer is made by an executor; much more when the transfer is made by a pledgee.⁷ But it is equally well settled that an honest purchaser, from a party having the power to sell, will acquire the title.⁸

§ 272. The bailee is held to a strict compliance with the terms of his contract, and is bound to apply the proceeds derived from the sale of a

interest of the pledgee. *Arnold v. Morgan*, 5 Sneed, 703. And where the pledgee permits the property to go back into the hands of the owner, and remain here indefinitely, the lien ceases against third persons. *Day v. Swift*, 48 Maine, 368. And it has been held that a surrender of it for a special purpose puts an end to the lien. *Bodenhamer v. Newson*, 5 Jones Law Rep. 107; and see *Beeman v. Lawton*, 37 Maine, 543.

¹ *Hays v. Riddle*, 1 Sand. 248.

² *Ingalls v. Lord*, 1 Cowen, 240; *Benjamin v. Stremple*, 13 Ill. 466; *Little v. Fassett*, 34 Maine, 545; *White v. Bascom*, 28 Vt. 268; *Voltz v. Blackmar*, 4 Hun, 139; *Thayer v. Manley*, 73 N. Y. 305.

³ *Bissel v. Drake*, 19 John. R. 66; *Pierson v. Townsend*, 2 Hill R. 550.

⁴ *Hays v. Riddle*, *supra*. Under §§ 539, 540, of the Code of Civil Procedure a variance is easily dealt with.

⁵ *Hart v. Ten Eyck*, 2 John. Ch. 62, 108; 1 Cowen, 743; *Roth v. Wells*, 29 N. Y. 471, 486, 491; *S. C.* 41 Barb. 194.

⁶ *Colt v. Lasmer*, 9 Cowen, 320.

⁷ *Sacia v. Berthould*, 17 Barb. 15.

⁸ *Bogert v. Hertell*, 4 Hill, 492.

pledge in an equitable manner. If, having two demands against a debtor, he receives a third person's note as security for one debt, and a pledge of the debtor's property for both, and afterwards sells the property for enough to pay both debts, he cannot pay over a part of the avails of the sale to his debtor, and then maintain an action on the surety's note. The law obliges the pledgee to apply the proceeds of the sale to the payment of both debts, thus relieving the surety.¹ Until the pledge is rendered available by a sale, the creditor has a right to hold both securities; but he cannot as we understand the rule surrender the pledge without discharging the surety.² This is on the ground that the pledge enures as a protection to the surety; and the creditor or pledgee becomes bound to use it as a means of obtaining payment from the debtor.³

§ 273. A party receiving a pledge or mortgage as a security for several debts contracted at the same time, must apply the proceeds derived from a sale of the pledge in equal proportion to the discharge of each debt; with this qualification, that the interest thereon is to be first paid, and the balance applied. On the other hand, if the debts secured by pledge be contracted at different times, and the pledge is deposited as a security for the first, with a subsequent agreement that it shall be retained as a further security for the others, the proceeds derived from the sale must be applied to the payment of the debts in the order in which they were contracted; for it is to be presumed that the pawnor pledged for the security of the debts last contracted only what remained of the pledge after payment of the first.⁴

§ 274. In the application of payments, there are two general rules: 1. where a debtor owes his creditor several debts upon distinct causes, and pays him a sum of money, he (the payor) has a right to say to which debt or debts the money shall be appropriated, provided he directs this at the time of the payment; and 2. the creditor is free to make the application as he deems proper, where the debtor gives no direction on the subject. These rules are confessedly subject to several qualifica-

¹ Strong v. Wooster, 6 Verm. R. 536.

² Pitts v. Congdon, 2 Comst. N. Y. Rep. 352; Chapman v. Clough, 6 Verm. 123; Grow v. Garlock, 97 N. Y. 87; Third Nat. Bank v. Shields, 55 Hun, 274.

³ Ramsey v. Lewis, 30 Barb. 403, 414. The surety's right of subrogation implies the same thing. Lewis v. Palmer, 28 N. Y. 271; and Ellsworth v. Lockwood, 42 N. Y. 89, 98.

⁴ Van Blarcom v. Broadway Bank, 9 Bosw. 532; S. C. 37 N. Y. 540; Herkimer M. & F. Co. v. Small, 21 Wend, 273; S. C. 2 Hill, 127; Pattison v. Hull, 9 Cowen, 747, and note b, 776. The theory that a corporation authorized to declare a forfeiture of stock for non-payment of calls thereon, holds the stock as a pledge, has been rejected. Small v. Herkimer Manuf. Co., 2 N. Y. 330.

tions.¹ Without stopping to dwell upon these, it is apparent that the creditor must often have the opportunity to apply a general payment upon the unsecured debts, leaving those unpaid for which he holds some pledge or security.² And as this opportunity is given to him on the theory that the debtor has waived his right to make the application, it is quite clear that he must apply the payment equitably, and at or near the time it is made. Otherwise the law makes the application upon principles of equity depending upon the circumstances; generally, to the satisfaction of the debts in the order in which they accrued; and *pro rata* where moneys are collected on securities embracing them all.³

§ 275. The relation in which the pledgee stands towards the pledgor under his contract is very similar in some respects to that which a factor or commission merchant, who has made advances on the goods in his hands, holds towards his principal; it is like and unlike. Like a pledgee, the factor has an interest in and a lien upon the goods for his advances. Unlike the pledgee, the factor ordinarily holds the goods with authority to sell them, in his own name and in the usual manner. A revocation of the factor's authority to sell after advances made leaves him in substantially the situation of a pledgee. As a pledgee, he cannot sell the

¹ *Patty v. Milne*, 16 Wend. 557; 22 Wend. 558. The rule giving a creditor holding several obligations or claims against his debtor the right to apply a payment made to him by the debtor, in the absence of any application made by the latter, is confined to cases of voluntary payments. The proceeds of a sale under a judgment of foreclosure of a mortgage, given by a debtor to secure various debts, are paid over to the creditor not as a voluntary payment, but by operation of law, and in the absence of any directions given in the security, their application is made by the court in accordance with equitable principles. If the proceeds are insufficient to satisfy all the debts in full, equity will apply them *pro rata*, each debt sharing in the fund without regard to priority of date, or to the fact that for some of the debts the creditor holds other security. *Bridenbecker v. Lowell*, 32 Barb. 9; *Cowperthwaite v. Sheffield*, 1 Sandf. 416; *S. C.* 3 N. Y. 243; *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543; *Sanford v. Van Arsdall*, 53 Hun, 70.

² See *Clark v. Burdett*, 2 Hall, 197; *Harding v. Tift*, 75 N. Y. 461.

³ See *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325. It is assumed in some of the cases that the law will apply a general payment to the secured or more burdensome debt, that is for the benefit of the debtor. *Patterson v. Hull*, 9 Cowen, 747. But that rule does not seem to be established on any firm foundation; the priority of the debt more often governs the application. *Baker v. Stackpole*, 9 Cowen, 420; *Dows v. Morewood*, 10 Barb. 183; *Allen v. Culver*, 3 Denio, 284; *Truscott v. King*, 6 N. Y. 147; and the rules of equity as frequently; *Stone v. Seymour & Bouck*, 15 Wend. 19-44; *Thomas v. Kelsey*, 30 Barb. 268; and the contract or security itself as often; that is, where moneys are collected on securities covering all the debts; *Bridenbecker v. Lowell*, 32 Barb. 9-24; *Cowperthwaite v. Sheffield*, 1 Sandf. 416; 3 N. Y. 243. The application is sometimes made on the debtor's implied direction. *Berrian v. Mayor, etc.*, of N. Y., 4 Robt. 538, 551.

property until he has first demanded payment of the debt secured, and thus given the owner a reasonable opportunity to redeem the property.¹

§ 276. The pledgee may, but he is not obliged to, resort to the property for the payment of his demand; he is not bound to exhaust his security.² On the other hand, the factor is bound to exhaust the fund in his hands, before he can call upon his principal for reimbursement; on the ground that his advances are understood to be made in anticipation of the moneys to be realized from a sale of the goods.³ And left without instructions, he may sell the goods for that purpose; after that he may call upon his principal for any balance that may remain due to him.⁴

§ 277. A pledgee has in some particulars more freedom in dealing with the goods in his hands than the factor is allowed under the common law; the pledgee may transfer or assign the pledge with the debt secured, and invest his assignee with all his rights in the security, so that practically the assignee may hold the pledge on the same terms and conditions;⁵ on the other hand the factor cannot at common law pledge the goods of his principal for his own benefit to the extent of his lien, or for the benefit of his principal; as an agent he has no authority to pledge the property; and if he assumes to do so, without express permission, he is guilty of a violation of his trust; and his act, being tortious and void, passes no title and can create no lien; on the contrary, it gives to the owner an immediate right of action for the goods against the pledgee, who is not allowed either to bar a recovery or reduce its amount by any inquiry into the state of the accounts between the principal and his unfaithful agent. By wrongfully pledging the goods and parting with the possession, the factor loses even his lien.⁶

¹ *Allen v. Dykers*, 3 Hill. 593; 7 Hill, 498; *Wilson v. Little*, 2 N. Y. 443; 4 Kent's Comm. 139, 140; *Tucker v. Wilson*, 1 P. Wms. 261; *Lewis v. Varnum*, 12 Abb. Pr. 305; *Garlick v. James*, 12 Johns. 148; *Farwell v. Importers', etc.*, Nat. Bank, 90 N. Y. 483, 490.

² *Elder v. Rouse*, 15 Wend. 218; *Kimball v. Huntington*, 10 Wend. 675; *Sterling v. The M. & S. Trading Co.*, 1 Serg. & R. 179; *Field v. Leavitt*, 37 N. Y. Supr. Ct. 215; *Moody v. Andrews*, 39 N. Y. Supr. Ct. 302; *Morris v. Fales*, 43 Hun, 393; *Gilbert v. Marsh*, 12 Hun, 519; *James v. Hamilton*, 2 Hun, 630; S. C. 63 N. Y. 616; *People v. Remington*, 121 N. Y. 328; *Lewis v. United States*, 92 U. S. 618; *Corn Exchange Ins. Co. v. Babcock*, 57 Barb. 231; *Queens Co. Bank v. Leavitt*, 32 St. Rep. 339.

³ *Gihon v. Stanton*, 9 N. Y. 476.

⁴ *Blackmar v. Thomas*, 28 N. Y. 67; *Blandford v. Wing Flour Mill Co.*, 24 Ill. App. 596; *Hidden v. Waldo*, 55 N. Y. 294.

⁵ *Ante*, §§ 257, 258, 266, 267.

⁶ *Walther v. Wetmore*, 1 E. D. Smith, 7; *Bonito v. Mosquera*, 2 Bosw. 401, 427;

§ 278. A factor receiving goods to sell on commission is impliedly authorized to sell them in the usual manner and on the usual terms and conditions; with a warranty or upon a credit, where that is the customary mode of selling the property in question.¹ When his instructions are express, he must follow them;² when given in general terms, he has a right, and it is his duty, to interpret them with reference to the usage of the business. His occupation as a factor implies certain rights and duties; among others the right to sell in his own name, without disclosing that of his principal;³ and the duty to safely keep and sell the goods to the best advantage.⁴ Intrusted with a discretion, he must act in good faith and with reasonable prudence, for the benefit of his principal.⁵

Phillips v. Huth, 6 Mees. & W. 595; Kennedy v. Strong, 14 John. 128; Buckley v. Packard, 20 John. 422; McFarland v. Wheeler, 26 Wend. 467; ante, § 214; McCreary v. Gaines, 55 Texas, 485.

¹ Smith v. Tracy, 36 N. Y. 79; Andrews v. Kneeland, 6 Cowen, 354; Hilton v. Vanderbilt, 82 N. Y. 591; Pinkham v. Crocker, 77 Me. 563.

² Edwards on Factors and Brokers, §§ 16-32; Hilton v. Vanderbilt, 82 N. Y. 591; Marfield v. Goodhue, 3 N. Y. 62; Commercial Nat. Bank v. Heilbronner, 108 N. Y. 439, 444.

³ Higgins v. Moore, 34 N. Y. 417.

⁴ Milliken v. Dehon, 27 N. Y. 364; Linley v. Carpenter, 4 Robt. 200; Adams v. Capron, 21 Md. 186.

⁵ Milbank v. Dennistoun, 21 N. Y. 386; 52 N. Y. 90, 605. The effect of a commission *del credere* is, in several particulars, to place the factor in new relation as to his principal. It is true, he is the debtor, but the principal still retains the right, at any time before payment, to resort to the purchaser as collateral security. It is a rule for the protection of the principal. The factor as guarantor under a *del credere* commission has no exclusive right to collect the proceeds of the sales. Merrill v. Thomas, 7 Daly, 393; Sherwood v. Stone, 14 N. Y. 267, 270; Moore v. Hillabrand, 37 Hun, 491. See Baker v. New York Nat. Exch. Bank, 100 N. Y. 31. But a factor who has guaranteed the sales is entitled to collect the proceeds in his own name, a right of which the principal cannot deprive him except by relieving him from his guaranty. Commercial Nat. Bank v. Heilbronner, 108 N. Y. 439, 443. A general factor may wait to receive instructions as to the mode of remitting the net proceeds, and is not liable to an action until a default, on his part, in remitting or paying the proceeds according to the orders of his principal. Ferris v. Parris, 10 John. R. 285. The only difference between a factor, acting under a *del credere* commission, or without one, is as to the sales made. In the former case he is absolutely liable, and may correctly be said to become the debtor of his principal; but it is not strictly correct to say that he is placed in the same situation as if he had become the purchaser himself; for, as we have seen, the principal, notwithstanding this liability, may exercise a control not allowable between creditor and debtor. When the principal appears, the right of the factor to receive payment ceases. The effect of the commission is not to extinguish the relation between principal and factor, but applies solely to a guaranty that the purchaser shall pay. The liability is not contingent, so as to require legal measures to be exhausted against the purchaser before the factor is bound, but an engagement

§ 279. *Sale or Foreclosure.* On a failure by the pledgor to pay the debt or discharge the obligation for which the pledge is given, the pledgee may file a bill in equity for a foreclosure and proceed to a judicial sale; or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale. Non-payment of the debt does not work a forfeiture, either under the civil or common law; it simply clothes the pledgee with authority to sell the pledge and reimburse himself for his debt, interest, and expenses; the residue of the proceeds belongs to the pledgor. The old rule, existing in the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But it is now settled that the pledgee may sell on a reasonable notice to the pledgor.¹

A lien on personal property does not of itself confer a right to sell; and the law seems to place the pledgee's right to sell the pledge and apply the proceeds to the payment of his demand, on the ground of an implied authority arising from the nature of the transaction:² the debtor intends that the security shall be made available, and the proceeds applied if necessary to the satisfaction of the debt; and the law sanctions a sale by the pledgee, under certain restrictions, as a proper and safe mode of applying the pledge in payment of the debt. It affirms his right to sell, like a mortgagee of chattels.³

§ 280. Under the Code of Louisiana, the pawnee cannot, on a failure of payment, dispose of the pledge; but must apply to a judge to order that the thing shall remain to him in payment for as much as it shall be valued at by two appraisers, or that it shall be sold at public auction, at the choice of the debtor; and every agreement authorizing the creditor to appropriate the pledge to himself, or to dispose of it without such formalities, is void.⁴ In the other States, where the common law

to pay on the day the purchase money becomes due. Although the factor is absolutely liable, he is not bound to pay until the money becomes due from the purchaser. Subject to the limitations above mentioned, the factor, under a commission, becomes a debtor to his principal. *Baker v. Langhorne*, 6 Taunt. 519; *Leverich v. Meigs*, 1 Cowen R. 645; *McKenzie v. Scott*, 6 Brown Par. Cas. 280; 7 Taunt. 164; *Boston Carpet Co. v. Journeay*, 36 N. Y. 384.

¹ *Cortelyou v. Lansing*, 2 Caines' Cas. 200; *Stearns v. Marsh*, 4 Denio, 227.

² *Pigot v. Cubley*, 15 C. B. (N. S.) 701.

³ *Pothonier v. Dawson*, Holt N. P. 385; *Cortelyou v. Lansing*, 2 Caines' Cas. 200; *Doane v. Russell*, 3 Gray (Mass.), 382; *Garlic v. James*, 12 John. R. 146; *Robinson v. Hanley*, 11 Iowa, 410; *Patchin v. Pierce*, 12 Wend. 61; *Hart v. Ten Eyck*, 2 John. Ch. 62, 100; *Nelson v. Edwards*, 40 Barb. 279.

⁴ Code, Art. 3132; *Flournoy v. Milling*, 15 La. Ann. R. 473. The Code of Louisiana is quite specific in regard to the making of the contract as well as the mode of sale. Arts. 3123 to 3129.

prevails, the pawnee is allowed to sell at his discretion, being held responsible, at his peril, to deal fairly and justly with the pledge. The difference between the civil and the common law in this respect, is modal; it hardly touches the essential rights of the parties under the contract. The civil law assumes the direction of the proceeding, working a foreclosure; and the common law gives a remedy for any violation of its principles, in a like proceeding.

§ 281. Under the ordinary contract of pledge, the pledgee's right to sell at common law does not accrue until after a default is made in the payment of the debt secured, or in fulfilling the engagement.¹ It is a breach of trust, a tortious act, to sell the pledge before the debt becomes due, or before the principal obligation matures.² His right to sell arises, like that of the mortgagee of chattels, on a default;³ until that occurs, he holds the pledge merely as a security. The right to foreclose or to sell the pledge is a remedy given to the creditor to enforce the principal obligation; the pledgee cannot therefore resort to either of these remedies, until his right accrues to enforce that principal obligation.

§ 282. Before the pledgee can proceed to a sale, under the usual contract of pledge, he must demand payment of the debt; he must call upon the pledgor to redeem, and must give him an opportunity to do so.⁴ The right to sell is conditioned upon a prior demand; it is to be exercised in a reasonable manner, after giving the pledgor a reasonable time to redeem the pledge. Hence a waiver of notice of sale, embodied in the contract or pledge, does not dispense with the necessity of such prior demand; and the rule is the same where the principal debt is already due.⁵ The law requires a demand, so that the pledgor may redeem, and thus save himself from a sacrifice of his property on a forced sale; and this principle is carried into the construction of special contracts of pledge.⁶

§ 283. An agreement by the debtor that the pledge shall become the

¹ Dykers v. Allen, 7 Hill, 497.

² Johnson v. Stear, 15 C. B. (N. S.) 330.

³ Spaulding v. Barnes, 4 Gray (Mass.), 330.

⁴ Wilson v. Little, 2 N. Y. 443, 448; Genet v. Howland, 45 Barb. 560; Hanks v. Drake, 49 Barb. 186; Markham v. Jaudon, 49 Barb. 462; S. C. 41 N. Y. 235; Stevens v. Hurlbut Bank, 31 Conn. 146; Davis v. Funk, 39 Pa. St. 243; Garlick v. James, 12 Johns. 148; Farwell v. Importers', etc., Nat. Bank, 90 N. Y. 483, 490; Cal. Civil Code, § 3001; Stenton v. Jerome, 54 N. Y. 480; Bryan v. Baldwin, 52 N. Y. 232; Jaroslowski v. Saunderson, 1 Daly, 232.

⁵ Wilson v. Little, *supra*; Cal. Civil. Code, § 3004.

⁶ Milliken v. Dehon, 27 N. Y. 364; Merwin v. Hamilton, 6 Duer, 244; Taylor v. Ketchum, 5 Robt. 607; Lawrence v. Maxwell, 53 N. Y. 19; Stenton v. Jerome, 54 N. Y. 480; Ogden v. Lathrop, 35 N. Y. Supr. Ct. 73; S. C. reversed, 65 N. Y. 158.

property of the creditor on a failure to pay the debt secured is illegal; the creditor is not allowed to stipulate for a forfeiture.¹ Subject to this rule of law, the parties are free to regulate the sale of the property in the contract of pledge; and as a matter of fact, they do often agree upon the place and mode of the sale, and upon the notice to be given. Without any agreement, the law requires that the sale shall be open and public; and it is competent for the parties to agree upon a sale at the Brokers' Board, not open to the general public; or upon a private sale;² the pledgee being bound to sell the property fairly, in the exercise of his rights under the contract. In the absence of any agreement, the sale must be made at public auction, at a place open to the general public, under circumstances fitted to insure a sale for an adequate price.³

§ 284. On short loans the custom now is to take from the borrower his note for the amount, accompanied with stocks or bonds as a collateral security, with authority to sell the same at the Brokers' Board, or Stock Exchange, or at public or private sale, on the non-payment of the note, and without notice.⁴ The authority is inserted in the note, in the form of a recital, and does not take from it its negotiable character.⁵

¹ *Williamson v. Culpepper*, 16 Ala. 211; *Lucketts v. Townsend*, 3 Texas, 119. The rule is everywhere assumed. *Walker v. Staples*, 5 Allen (Mass.), 34; *Kimball v. Hildreth*, 8 Allen, 167; ante, § 250; *Jessup v. City Bank*, 14 Wis. 331.

² *Brass v. Worth*, 40 Barb. 648, 653; *Costelo v. City Bank*, 1 N. Y. Leg. Obs. 25; *Rankin v. McCullough*, 12 Barb. 103; *Dykers v. Allen*, 7 Hill, 497, 499; *Baker v. Drake*, 66 N. Y. 518; *Williams v. United States Trust Co.*, 133 N. Y. 660; *Carson v. Iowa City Gaslight Co.*, 45 Northwest. Rep'r (Iowa), 1068; *Milliken v. Dehon*, 27 N. Y. 364. See *Maryland, etc., Ins. Co. v. Dalrymple*, 25 Md. 242; *Baltimore, etc., Ins. Co. v. Dalrymple*, 25 Md. 269, 424; *Willoughby v. Comstock*, 3 Hill, 389; *Brown v. Ward*, 3 Duer, 660; *Bryson v. Rayner*, 25 Md. 424.

³ *Strong v. Nat. Mechanics' Banking Ass'n*, 45 N. Y. 718, 720; *Dykers v. Allen*, 7 Hill, 497; *Wheeler v. Newbould*, 16 N. Y. 392; *Morgan v. Dod*, 3 Col. 551. In *Brown v. Ward* the court hold that a sale of stocks by the pledgee must be made at the Merchants' Exchange, at public auction, unless some other mode of sale is agreed upon by the parties. 3 Duer, 660. It is for the owner to show that the sale was not made at the proper place; so held where the pledge, gold, was sold at the Gold Board in New York. *Schepeler v. Eisner*, 3 Daly, 11. See *Willoughby v. Comstock*, 3 Hill, 389.

⁴ Here is a form of the note, with the authority:

\$500.

ALBANY, January 30, 1875.

Ninety days after date I promise to pay Richard Roe or order, at the First National Bank of Albany, five hundred dollars for value received, with interest, having deposited with him as collateral security, with authority to sell the same, at the Brokers' Board in the City of New York, at public or private sale, or otherwise, at his option, on the non-performance of this promise, and without notice, 5 shares N. Y. Central stock.

JOHN DOE.

See also, the form of the note with the authority to sell in *Williams v. United States Trust Co.*, 133 N. Y. 660, 661.

⁵ *Fancourt v. Thorn*, 9 Q. B. 312; 10 Jur. 639; 16 L. J. Q. B. 344.

Under an agreement so ample, the pledgee has the right to sell the pledge as soon as the note is due; the contract, being fairly made and executed, prescribes the rights and liabilities of the parties.¹ It supersedes the necessity of a demand, before the sale; and it waives the notice required by law. In legal effect, it enables the pledgee to convert the pledge into money by an immediate sale; and adds new features to the contract, by taking away from it some of the safeguards by which the law protects the interests of the pledgor. But the same contract does not authorize an immediate sale, without demand, where the debt secured is payable on demand, or where the time of payment is indefinite; because here it cannot be supposed that the pledgor intended to authorize a sale before being called upon to fulfill his contract.²

Under a pledge of stocks, by which the owner in express terms sells and assigns them for value received, with the scrip, accompanied by a power of attorney to complete the transfer, the pledgee is practically invested with the title; he is enabled to sell or pledge them as owner, in excess of his actual authority, so that a party making advances on the stocks, on the faith of the apparent title, may hold them. Though the sale or second pledge is made by the pledgee in bad faith, it is valid in favor of the party taking the stocks in good faith, for value; on the same principle as like pledges are held valid under the factors' act.³

§ 285. There does not appear to be any reason to prevent a demand of payment from being made at the time the notice of sale is given.⁴ As steps prerequisite to a sale, they are not to be confounded; the object of the demand is to prevent a sale, by rendering it unnecessary; and the object of a notice is to enable the debtor to take proper meas-

¹ Williams v. United States Trust Co., 133 N. Y. 660. An agreement fixing the time the pledgee was to hold the pledge was upheld in Rankin v. McCullough, 12 Barb. 103. In Genet v. Howland, 45 Barb. 560, the court held the agreement valid. The same doctrine is held in Milliken v. Dehon, where the contract was special; 10 Bosw. 325 S. C. 27 N. Y. 364; and in Taylor v. Ketchum, 35 How. Pr. R. 289; Stevens v. Ball, 6 Mass. R. 339; Mowry v. Wood, 12 Wis. 413; Vose v. Florida R. Co., 50 N. Y. 369.

² Wilson v. Little, 1 Sandf. 351; S. C. 2 N. Y. 443; Garlick v. James, 12 John. R. 146, 149; Odgen v. Lathrop, 3 Jones & S. 73; S. C. 1 Sweeny, 643; S. C. 65 N. Y. 158. In this case effect is given to a clause in the pledge permitting the pledgee to "use, transfer or hypothecate the stock."

³ McNeil v. The Tenth National Bank, 46 N. Y. 325; Jarvis v. Rogers, 13 Mass. 105; 15 Mass. 389; Fatman v. Loback, 1 Duer, 354. See *Ex parte* Swan, 7 C. B. (N. S.) 400; Swan v. The North British A. Co., 7 Hurl. & Nor. 603; 2 Hurl. & Coltman, 175. See also, Merchants' Bank v. Livingston, 74 N. Y. 223, 226.

⁴ Notice of an intention to foreclose was held equivalent to a demand, in Howe v. Bemis, 2 Gray, 203.

ures to insure a fair sale; and both must be reasonable in point of time.¹ The duty of the pledgee to call upon the pledgor to redeem, and to give him notice of the sale, is the same whether the pledge is delivered at the time the debt is contracted, or afterwards; it is the same whether the pledge is made before or after the debt becomes due.²

§ 286. Personal notice of the sale must be given to the pledgor or left at his residence; and if he cannot be found so as to be served with notice, judicial proceedings must be had, in order to authorize a sale.³ As to what shall be considered a reasonable notice of the sale of goods mortgaged or pledged as a collateral security, there does not seem to be any settled rule. The cases agree that a sale may be had of the goods on a reasonable previous notice of the time and place of sale; and that the object of this notice is to give the pledgor an opportunity to redeem, or to attend the sale for the purpose of seeing that the property is not sacrificed.⁴ Judging from the object, it is evident that what would be a reasonable notice in one case would be entirely inadequate in another. Stocks and bonds may be sold at the Brokers' Board, or Stock Exchange, the market for that species of property, with entire safety on a short notice.⁵ When the pledge consists of goods and chattels personal, per-

¹ *Genet v. Howland*, 45 Barb. 560. Here the pledge was given for a loan payable on demand, with full authority to sell; held that a reasonable demand was necessary, though no notice was necessary under the agreement. See, also *Parker v. Brancker*, 22 Pick. 40; *Washburn v. Pond*, 2 Allen (Mass.), 474.

² *Stearns v. Marsh*, 4 Denio, 227. For old rule, see *Bac. Abr. Bailment*, B.

³ *Garlick v. James*, 12 John. R. 146; 2 Story's Eq. § 1008; *Stearns v. Marsh*, 4 Denio, 227; *Strong v. National B. Asso.*, 45 N. Y. 718; *Bryan v. Baldwin*, 7 Lansing, 174.

⁴ The following cases hold that the notice of the sale of a pledge must specify the time and place: *Lewis v. Graham*, 4 Abbott's Pr. R. 106; *Costelo v. City Bank*, 1 N. Y. Leg. Obs. 25; *Wheeler v. Newbold*, 5 Duer, 29; 16 N. Y. 392; *Taylor v. Ketchum*, 5 Robt. 507; *Brass v. Worth*, 40 Barb. 648; *Strong v. National M. B. Asso.*, 45 N. Y. 718, 720; *Markham v. Jaudon*, 49 Barb. 462; S. C. 41 N. Y. 235; *Brown v. Ward*, 3 Duer, 660. The notice may be waived by agreement. See *Milliken v. Dehon*, 10 Bosw. 325; S. C. 27 N. Y. 364; *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Hyatt v. Argenti*, 3 Cal. 151; *Davis v. Funk*, 39 Pa. St. 243; *Conynham's Appeal*, 57 Pa. St. 474; *MARVIN, J.*, calls the rule in question; 27 N. Y. 364; and these cases hold that an express power in a chattel mortgage to sell at private sale may be executed without notice. *Chamberlain v. Martin*, 43 Barb. 607; *Haskins v. Patterson*, 1 Edm. R. 120; *Huggars v. Fryer*, 1 Lansing, 276; the agreement controls; *Vose v. Florida R. Co.*, 50 N. Y. 369.

⁵ A sale of stocks at the Brokers' Board on two days' notice, not objected to, was held valid in *Willoughby v. Comstock*, 3 Hill, 389; and valid, though objected to, in *Bryan v. Baldwin*, 7 Lansing, 174; in another case a notice given on the 13th of November for a sale on the 20th was considered reasonable; *Md. Fire Ins. Co. v. Dalrymple*, 25 Md. 242; in another case it appears that the parties agreed on a sale of bonds at the Brokers' Board, on a notice of five days, doubtless deeming that a reasonable notice; *Vose v. Florida Railroad Co.*, 50 N. Y. 369, 373.

haps the safest rule is to give the same notice which is required to be given of a sale of personal property, seized on execution. The presumption is, that what the law holds a reasonable notice in respect to similar goods, would be held sufficient to protect the mortgagee or pledgee of goods. As courts of equity watch such proceedings with vigilance, it is necessary that the manner of sale should be perfectly open and public, and free from all unfairness. There must be six days' notice given of the sale of goods and chattels on execution, describing briefly the property, and specifying the time and place of sale.¹ At the time and place specified, the goods to be sold must be present, subject to the inspection and examination of the bidders. Unless the property is so present, the sale will be invalid.² The officer must also point out the property specifically, and sell it in parcels.³ His proper course is to sell only so much of the property, which can be conveniently and reasonably sold separately, as will satisfy the execution.*

§. 287. Legislation on the subject may aid us to determine what is a reasonable notice; it certainly throws some light on the question. It affirms the necessity of a notice, and, so far as we have any examples, it indicates an opinion in favor of a notice sufficiently long to furnish every opportunity to redeem the property, or at all events to protect it from being sacrificed on the sale.⁵

¹ 3 R. S. of New York, 645, 648, 5th ed.; 2 Kent's Comm. 583; Code of Civil Pro. § 1429. It need not describe the execution nor give the name of the judgment debtor. *Chapman v. Morrill*, 19 Hun, 318.

² Code of Civil Pro. § 1428; *Cresson v. Stout*, 17 John. R. 116; unless the property is of a peculiar nature—stereotype plates; *Bruce v. Westervelt*, 2 E. D. Smith, 440.

³ *Sheldon v. Soper*, 14 John. R. 352; *Breese v. Bange*, 2 E. D. Smith, 474; Code of Civil Pro. § 1428.

⁴ *Hewson v. Dygert*, 8 John. R. 333, 335. The nature of the property and its situation will generally indicate in what parcels it should be offered for sale; and the defendant's consent may justify a sale in large parcels. *Stephens v. Baird*, 9 Cow. 274. Plaintiff's consent will not be inferred from the silence of his agent sent to bid on the sale. *Wyman v. Hart*, 12 How. Pr. 122. It is proper to sell in mass property covered by a chattel mortgage. 4 Denio, 171.

⁵ FORECLOSURE OF PLEDGES.

The statutes of this State prescribe the manner in which the corporation known as the Collateral Loan Association shall sell unredeemed pawns or pledges. Laws of 1884, Chap. 543, as amended by Laws of 1885, Chap. 503. The act concerning pawn-brokers also prescribes the manner in which pawns or pledges shall be sold. Laws of 1883, Chap. 508, as amended by Laws of 1890, Chap. 240. See also, Penal Code, §§ 353—355.

The statutes of California require the pledgee to give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such reasonable time before the sale as will enable the pledgor to attend (Cal. Civil Code, § 3002), unless notice is waived (Id. § 3003), and also require that a sale by a pledgee of property

§ 288. The pledgee's right to sell may be modified, enlarged or restricted by the circumstances and purpose of the pledge. A pledge of stocks, as we have seen, puts the property within the power of the pledgee; and a pledge of goods in the hands of a carrier, by a delivery of his receipt or the bill of lading as a collateral security for the acceptance of a draft drawn on the consignee, on a discount of the draft, transfers the title to the property. It vests the title in the party discounting the draft, in trust to transfer it to the drawee on his accepting the draft, or on his refusal, to sell the goods and pay the draft. The transaction is more like a mortgage than a pledge, because it is held to transfer the title; it is like an assignment; it enables the assignee

pledged must be made at public auction in the manner and upon the notice to the public usual at the place of sale in respect to auction sale of similar property, and must be for the highest obtainable price. *Id.* § 3005.

The statute in Massachusetts provides a way in which chattel mortgages and pledges may be foreclosed. *Gen. Statutes of 1860*, pp. 766, 767, § 9: "The holder of personal property in pledge for the payment of money, or the performance of any other thing, may, after failure to pay or perform, give written notice to the pledgor that he intends to enforce payment or performance by a sale of the pledge, and such notice shall be served, and together with an affidavit of service be recorded in the clerk's office of the city or town where the pledgee resides," three weeks before the sale. The notice of sale must be reasonable. *Brackett v. Bullard*, 12 Met. 308. The notice may be given immediately, where a chattel mortgage is given to secure the payment of a note due on demand. *Southwick v. Hapgood*, 10 Cush. 119. Notice of an intention to foreclose is tantamount to a demand of the amount due. *Howe v. Bemis*, 2 Gray, 203.

§ 10. "If the money to be paid, or other thing to be done, is not paid or performed, or tender thereof made within sixty days after such notice is so recorded, the pledgee may sell the pledge at public auction and apply the proceeds to the satisfaction of the debt or demand, and the expenses of the notice and sale, and any surplus shall be paid to the party entitled thereto, on demand."

§ 11. "The preceding sections shall not authorize the pledgee to dispose of the pledge contrary to the terms of the contract under which it is held, nor limit his right to dispose of it in any other manner allowed by the contract or the rules of law."

The holder of any collateral security for the payment of a debt is liable to be punished by fine or imprisonment for any sale, pledge or disposition of the same without authority, before the debt secured becomes due. *Gen. Statutes*, 803, § 64.

"In transfers of stocks as collateral security, the debt or duty which such transfer is intended to secure shall be substantially described in the deed or instrument of transfer. A certificate of stock issued to a pledgee or holder of such collateral security shall express on the face of it that the same is so holden; and the name of the pledgor shall be stated therein, who alone shall be responsible as a stockholder." A creditor of the shareholder has a right to examine the record of such transfer. *Gen. Statutes*, p. 385, §§ 13, 14, *New Hampshire*. The statute gives and defines various liens, and provides a mode of foreclosing them; it allows the lienholder, by way of pledge, to sell the property at auction, on three weeks' notice of the time and place of sale. The notice with affidavit of service and an account of the sale are to be recorded in the town clerk's office. *Gen. Statutes (1867)*, 260.

to dispose of the goods and apply the proceeds towards the payment of the draft.¹

A draft in the usual form, drawn against a consignment of goods, does not give the payee or holder any lien on the goods, or upon their proceeds.² But such a draft, with a letter of advice to the consignee that the same is to be paid out of the proceeds of the sale, appropriates the goods to that purpose; and if the consignee accepts the consignment and promises to honor the draft, he must hold the fund subject to that order.³ So where an order is drawn on the custodian of a fund, directing that it be paid to a party named for value, or where the drawer is indebted to the payee, the order, being assented to by the drawee, is equivalent to an equitable assignment of the moneys; it is an appropriation of the fund to the payment of the draft.⁴ It binds the party on whom it is drawn.

§ 289. Where the title to goods is transferred as a security for a draft or for advances, the transferee has the power to dispose of the property, without going through any process of foreclosure.⁵ He holds the goods like an assignee, in trust; the transfer is in legal effect a chattel mortgage;⁶ it leaves a residuary interest in the mortgagee, which may be reached by his creditors;⁷ and it enables him to deal with the property as owner. A defeasance accompanying the transfer renders it a mortgage; to be foreclosed as such, in the discretion of the mortgagee.⁸

¹ *Bank of Rochester v. Jones*, 4 Denio, 489; *S. C.* 497; *Allen v. Williams*, 12 Pick. 297; *The City Bank v. The R. & O. R. R. Co.*, 44 N. Y. 136; *Cayuga Co. Nat. Bank v. Daniels*, 47 N. Y. 631; *The Marine Bank of Chicago v. Wright*, 48 N. Y. 1. A pledge of stocks with power to hypothecate the same, and afterward return like stock, is valid. *Ogden v. Lathrop*, 65 N. Y. 158.

² *Cowperthwaite v. Sheffield*, 1 Sandf. 416, 449; *S. C.* 3 N. Y. 243, 251; *Winter v. Drury*, 5 N. Y. 525; *Chapman v. White*, 6 N. Y. 412.

³ *Lowery v. Steward*, 3 Bosw. 505; *S. C.* 25 N. Y. 239.

⁴ *Parker v. City of Syracuse*, 31 N. Y. 376; *Shuttleworth v. Bruce*, 7 Robt. 160; *Edwards on Bills and Notes*, 379, 421-424; *Brill v. Tuttle*, 81 N. Y. 454; *Ehrichs v. De Mill*, 75 N. Y. 370; *Risley v. Smith*, 64 N. Y. 576; *Munger v. Shannon*, 61 N. Y. 251; *Lewis v. Berry*, 64 Barb. 593; *Lauer v. Dunn*, 115 N. Y. 405; *Stevens v. Ogden*, 130 N. Y. 182; *Conselyea v. Blanchard*, 103 N. Y. 222.

⁵ These cases relate to choses in action: *Eno v. Crooke*, 10 N. Y. 60; *Smith v. Miller*, 25 N. Y. 619; *Breese v. Bange*, 2 E. D. Smith, 474. See *Peck v. Morrell*, 26 Vt. 686; 10 Bosw. 332; *Sherman v. Elder*, 24 N. Y. 381; *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568; *Dows v. Nat. Exch. Bank*, 91 U. S. 618.

⁶ *Thompson v. Blanchard*, 4 N. Y. 303. The chattel mortgage is void as against third parties, unless filed; but valid as between the parties. *Marsh v. Lawrence*, 4 Cowen, 461; *Brown v. Bement*, 8 John. 96; *Ackley v. Finch*, 7 Cowen, 290.

⁷ *Smith v. Beattie*, 31 N. Y. 542; *Leitch v. Hollister*, 4 N. Y. 211.

⁸ *Langdon v. Buel*, 9 Wend. 80; *Hall v. Tuttle*, 8 Wend. 375, 392. For the distinction between a mortgage and a pledge, see ante, §§ 178, 186, 246-248.

—essential in order to vest in him an absolute property, discharged from the equity of redemption.¹

§ 290. A commission merchant or factor who receives goods for sale, and pays charges or makes advances upon them, acquires a lien upon the property; a particular lien upon the goods for charges and advances made upon them, and also a general lien for the balance of his account arising in the course of dealings between him and his principal.² Acting as a factor he has the right to sell in his own name as apparent owner, without disclosing the name of his principal.³ His authority to sell is either express or implied; having made advances on the goods, and being left without any special instructions, he has an implied right to sell for his reimbursement.⁴ And the owner has the right to control the sale; to prescribe the price, time and conditions of the sale, subject only to the factor's lien.⁵ As an agent, the factor must follow his instructions, whether given before or after the advances are made;⁶ and he cannot depart from them and sell for his own benefit, without first calling upon his principal to reimburse his advances. His authority to sell is coupled with an interest in the goods, and it cannot be wholly revoked; hence it is held that the factor may sell even contrary to instructions, and for his own benefit, after having given the owner a reasonable notice of his intention to do so, with an opportunity to reimburse his advances. His position is like that of a pledgee, after his authority to sell has been recalled; he must demand payment, and notify his principal of his intention to sell; but need not, it would seem, notify him of the time and place of the intended sale.⁷

§ 291. A trustee or agent is not allowed to assume a position in which his interest will come in conflict with his duty; where he sells as a

¹ *Hoyt v. Martense*, 16 N. Y. 231.

² *Edwards on Factors and Brokers*, §§ 71-78; *Myer v. Jacobs*, 1 Daly, 32; *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, 491; *Bryce v. Brooks*, 26 Wend. 367; *Knapp v. Alvord*, 10 Paige, 205.

³ *Barring v. Corrie*, 2 Barn. & Ald. 137, 143; *Bryce v. Brooks*, 26 Wend. 367; *Higgins v. Moore*, 34 N. Y. 417.

⁴ *Blackman v. Thomas*, 28 N. Y. 67; *Beadles v. Hartmus*, 7 Baxter, 476.

⁵ *Raleigh v. Atkinson*, 6 Mees. & Wels. 670; *Bell v. Palmer*, 6 Cow. 128; *Marfield v. Goodhue*, 3 N. Y. 62.

⁶ *Marfield v. Goodhue*, *supra*; *Blot v. Boiceau*, 3 N. Y. 78; *Raleigh v. Atkinson*, 6 Mees. & Wels. 670; *Hilton v. Vanderbilt*, 82 N. Y. 591; *Casson v. Field*, 52 N. Y. Supr. Ct. 196.

⁷ *Frothingham v. Evertson*, 12 N. H. 239, 242; *Parker v. Bruncker*, 22 Pick. 40. It has been suggested that the factor is not bound to observe instructions given after advances made. *Brown v. McGrau*, 14 Peters, 479. But the rule is otherwise, as stated in the text; *Smart v. Sanders*, 54 Eng. Com. Law, 379; unless there be an agreement between the parties; *Milliken v. Dehon*, 27 N. Y. 364.

trustee, he is not permitted to purchase as an individual, directly or indirectly. The doctrine is of equitable origin, designed to close the door against temptation; it allows the injured party to set aside the sale and take the property; it applies to sales of both personal and real estate.¹ But we have one important exception to this general rule; the practice in this State, continued from a very early day, allows mortgagees to become purchasers at sales conducted by them, under powers contained in mortgages of real estate.² The statute allows the mortgagee to purchase the premises fairly and in good faith.³ The same thing is allowed, where a sale is had under a decree in an action of foreclosure; ⁴ the exception does not, however, extend to a sale made and conducted by a trustee.⁵ The trustee is not allowed to acquire and hold the property, through a sale made by himself; the law does not suffer him to take advantage of his position, which is one of confidence, and purchase the property in his own name or in the name of another person.⁶ Though the purchase be not void at law, it is voidable at the suit of the party for whom the trustee acts.

§ 292. The pledgee holds the property in his hands on a trust, and where he proceeds to sell on notice, he is not allowed to become the purchaser; and if he does, the sale is voidable at the election of the pledgor, and the bailment continues unaffected.⁷ The pledgor may, however,

¹ *Davoue v. Fanning*, 2 John. Ch. 252; *De Caters v. Le Ray De Chaumont*, 3 Paige Ch. 178; *Fulton v. Whitney*, 66 N. Y. 548; *Bennett v. Austin*, 81 N. Y. 398; *Case v. Carroll*, 35 N. Y. 385. See Code Civil Pro. § 1676; *Scholle v. Scholle*, 101 N. Y. 167, 171. A party entitled to the income of an estate for life cannot pledge it to the trustee holding the estate. *Van Epps v. Van Epps*, 9 Paige Ch. 238; *Bank of Orleans v. Torrey*, 9 Paige, 649; *S. C. 7 Hill*, 260; *Iddings v. Bruen*, 4 Sandf. Ch. 223, 263; *Moore v. Moore*, 5 N. Y. 256; *Bain v. Brown*, 56 N. Y. 285. Where a trustee has an interest to protect by bidding at the sale of trust property, and he makes special application to the court for permission to bid, which, upon a hearing of all the parties interested, is granted by the court, then he can make a purchase which is valid, and under which he can obtain a perfect title. *Scholle v. Scholle*, 101 N. Y. 167, and cases cited.

² *Bergen v. Burnett*, 1 Caines' Cas. 1-19; *Slee v. Manhattan Co.*, 3 Paige, 48, 73; *Jackson v. Colden*, 4 Cowen, 266, 275.

³ 3 R. S. 861, 5th ed.

⁴ Rules of Court, No. 73.

⁵ *Slade v. Van Vechten*, 11 Paige Ch. 21. The fact that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, has been inserted in the judgment, is not sufficient to enable a trustee to purchase the trust estate. Such a provision is inserted in the judgment merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others. *Fulton v. Whitney*, 66 N. Y. 548; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Conger v. Ring*, 11 Barb. 356; *Scholle v. Scholle*, 101 N. Y. 167.

⁶ *Gardner v. Ogden*, 22 N. Y. 327; *Jewett v. Miller*, 10 N. Y. 402.

⁷ *Bryan v. Baldwin*, 52 N. Y. 232; *Duncomb v. New York, H. & N. R. R. Co.*, 84

ratify the sale, and where this is done the sale is valid for all purposes.¹

§ 293. We have seen in passing that a pledgee has no implied right to sell notes and ordinary choses in action; and it is settled that where the contract of pledge is silent on the subject, he has no right to sell them at public or private sale. The right to sell and apply the proceeds of goods and chattels and stocks is based upon the presumed intention of the parties; and this exception is based upon the same ground, namely, that it cannot have been the intention of the parties to subject to the hazards of a sale a species of property for which there is no reliable market.² The law therefore infers that the true intent of the transaction is, that the pledgee shall receive the moneys on the securities as they fall due, or collect them by suit at his option; a right which he has under the contract, where he is expressly authorized to sell the security.³ The contract imports an authority to collect the collaterals;⁴ and hence the pledgee may sue and recover upon a note held as a pledge, though not indorsed over to him by the pledgor;⁵ the same rule now held in favor of the donee of like securities.⁶ The right to collect the original debt remains unaffected by the pledge; unless restrained by the

N. Y. 190, 205; *Roach v. Duckworth*, 95 N. Y. 391, 402; *Hamilton v. Schaack*, 16 Weekly Dig. 423; Cal. Civil Code, § 3010. And see *Canfield v. Minneapolis Agricultural, etc., Assoc.*, 14 Fed. Rep. 801, holding that a purchaser from the purchasing pledgee, with notice of the facts, takes only the title which the pledgee had before the sale. The rule prohibiting the pledgee from becoming the purchaser at the sale of the pledge applies to a sale, under an execution issued upon a judgment recovered in an action brought by the pledgee against the pledgor to recover the debt secured by the pledge. *Duden v. Waitzfelder*, 16 Hun, 337. But see *Adams v. Coons*, 37 La. Ann. 305; *Clark v. Holland*, 72 Iowa, 34. A special partner may purchase on a sale of a pledge held by the firm. *Lewis v. Graham*, 4 Abb. Pr. 106.

¹ *Bryan v. Baldwin*, 52 N. Y. 232; *Roach v. Duckworth*, 95 N. Y. 391, 402; *Hill v. Finigan*, 62 Cal. 426. See *Olcott v. Tioga R. R. Co.*, 40 Barb. 179, 190. The rule that the pledgee cannot buy at his own sale of the pledged property may be waived by express agreement of the parties. *Chouteau v. Allen*, 70 Mo. 290. The assent to such purchase may also be presumed where the facts are notorious and no dissent is shown. *Carroll v. Mullamphy Savings Bank*, 8 Mo. App. 249.

² *Wheeler v. Newbold*, 16 N. Y. 392; S. C. 5 Duer, 29; *Strong v. Nat. Mechanics' Banking Assn.*, 45 N. Y. 720; ante, § 238. The rule does not apply to government bonds or the bonds of a corporation. *Morris Canal, etc., Co. v. Lewis*, 12 N. J. Eq. R. 323; 3 Duer, 660; *Jessup v. City Bank*, 14 Wis. 331; *Moody v. Andrews*, 39 N. Y. Supr. Ct. 302.

³ *Nelson v. Eaton*, 26 N. Y. 410.

⁴ *Nelson v. Wellington*, 5 Bosw. 178; *Nelson v. Edwards*, 40 Barb. 279.

⁵ *Louisiana State Bank v. Gaiennie*, 21 La. Ann. R. 555; *White v. Phelps*, 14 Minn. R. 27.

⁶ *Sessions v. Moseley*, 4 Cush. 87; *Bates v. Kempton*, 7 Gray, 382; *Chase v. Redding*, 13 Gray, 418; *Brown v. Brown*, 18 Conn. 410; *Westerlo v. De Witt*, 36 N. Y. 340.

contract the creditor may prosecute all the remedies given to him by law, at the same time. After paying the amount due to him, with the costs and expenses of collection, the surplus, when more is collected, belongs to the pledgor.¹

§ 294. Under an assignment of property to indemnify a surety, the assignee is bound to take charge of the property and convert it into money, in the due execution of the trust.² The surety and also the creditor is entitled to have the property and all collaterals applied towards the payment of the debt; and may enforce this right by a bill in equity.³ The assignee has an implied power to sell; and it is his duty to proceed with diligence.⁴ Unless authorized to sell at private sale, his true course is to sell at auction, on a reasonable notice of the time and place; for cash, unless authorized by statute to sell on a credit.⁵

Where a mortgage of a third person is assigned by the mortgagee as collateral security for his own debt, the transaction is in substance a mortgage or pledge of the transferred security. The assignee takes the title with the power of sale contained in the mortgage, and may foreclose it in his own name. If the assignee forecloses the mortgage without making the assignor a party defendant so as to foreclose his right, and purchases the mortgaged premises at the sale, such foreclosure and purchase by the assignee, as against the assignor, works no other result than to substitute the land for the mortgage in the hands of the assignee, and to leave it subject to the assignor's right by payment of the debt to reclaim and hold his own property discharged of the assignee's lien upon it. If on the foreclosure sale the property is bid in by a stranger, the right of the assignor attaches to the purchase money.⁶ The assignee may so make the assignor a party defendant in the foreclosure action that the assignor's equity, as well as that of the mortgagor, will be involved in the judgment and extinguished by the sale.⁷

§ 295. When a pledge is delivered or a chattel mortgage is given to

¹ *Plants, etc., Co. v. Falvey*, 20 Wis. R. 200; *Hilton v. Waring*, 7 Wis. 492; 98 Mass. 303; 99 Mass. 338; *Stevens v. Bell*, 6 Mass. 339; *Lawrence v. Maxwell*, 53 N. Y. 19; *Farwell v. Importers', etc., Nat. Bank*, 90 N. Y. 483.

² *Keyes v. Brush*, 2 Paige, 311.

³ *Pratt v. Adams*, 7 Paige, 615, 627; *Ward v. Lewis*, 4 Pick. 518; *Pitts v. Congdon*, 2 N. Y. 352; *Farwell v. Importers', etc., Nat. Bank*, 90 N. Y. 483, 491; *Wright v. Austin*, 56 Barb. 13.

⁴ *Hart v. Crane*, 7 Paige, 37.

⁵ *Nicholson v. Leavitt*, 6 N. Y. 510.

⁶ *Slee v. Manhattan Co.*, 1 Paige, 48, 52, 79; *Hoyt v. Martense*, 16 N. Y. 231; *Matter of Gilbert*, 104 N. Y. 200; *Dalton v. Smith*, 86 N. Y. 176; *Case v. Carroll*, 35 N. Y. 385, 390.

⁷ *Bloomer v. Sturges*, 58 N. Y. 168.

one person, as a security to two or more persons, the pledgee or party holding the security is bound to fulfill the terms of the contract; it is his duty to convert the property into money within a reasonable time, and apply it upon the debts according to the agreement of the parties. He is not at liberty to postpone the sale, or hold the property at his pleasure.¹

§ 296. The party holding a pledge as security for a debt due to himself is not obliged to proceed and sell it within any given time; it is for the debtor to initiate active measures, and unless he does so he cannot complain of the pledgee on account of a loss happening from mere delay.² The creditor is not bound in the first instance to resort to the property for the payment of the debt.³ Neither is he prevented from collecting his debt, by attaching or levying upon and selling the property.⁴ Without doubt he is bound to take all proper steps to preserve the pledge, and this duty may include the bringing of a suit where that becomes essential to its preservation.⁵

A party who sells under a power is not bound to sell at once all the property covered by the power, and in many cases it would be an act of great oppression to do so. This is clearly the rule where the power is to sell real estate; and there does not appear to be any reason why it should not apply where the power is to sell personal property. The mortgagee or pledgee of goods exercises a trust in the act of selling them, and is responsible as a trustee for the way in which he conducts the sale. The authority is exhausted, as soon as a sufficient sum is realized to satisfy the debt secured.⁶

¹ Norton v. Squire, 16 John. R. 225; Marshall v. Bryant, 12 Mass. R. 321; Pothonier v. Dawson, Holt's N. P. R. 386; ante, § 273.

² Granite Bank v. Richardson, 7 Met. 407; Word v. Morgan, 5 Sneed, 79. See Minneapolis, etc., Co. v. Betcher, 42 Minn. 210; Cooper v. Simpson, 41 Minn. 48; Gilbert v. Marsh, 12 Hun, 519.

³ Butterworth v. Kennedy, 5 Bosw. 143; Elder v. Rouse, 15 Wend. 218; Case v. Boughton, 11 Wend. 106; Bank of Rutland v. Woodruff, 34 Vt. 89; Townsend v. Newell, 14 Pick. 332; Rozett v. McClellan, 48 Ill. 345; 37 Supr. Ct. (5 J. & S.) 315; Moody v. Andrews, 39 Supr. Ct. 302; 64 N. Y. 641; James v. Hamilton, 2 Hun, 630; 63 N. Y. 616; Gambling v. Haight, 59 N. Y. 354; Ehrlich v. Ewald, 66 Cal. 97.

⁴ Arendale v. Morgan, 5 Sneed, 704; Buck v. Ingersoll, 11 Met. 226; Allen v. Clark, 65 Barb. 563; Lincoln v. Linde, 27 Abb. N. C. 278. It is held in Massachusetts that the creditor, by attaching the goods on other demands, does not lose his lien as a pledgee where he gives the officer notice of his intention to retain it. Townsend v. Newell, supra, and Whitaker v. Sumner, 20 Pick. 399, 406.

⁵ Ante, §§ 238, 240-244.

⁶ Charter v. Stevens, 3 Denio, 33; Briggs v. Oliver, 68 N. Y. 336, 339. The remedy for an unfair sale is by a bill to redeem. Stoddard v. Dennison, 2 Sweeny, 54; 38 How. Pr. 296; 7 Abbott Pr. (N. S.) 309.

§ 297. Instead of selling on his own responsibility, the pledgee has a right to file a bill in equity and proceed to a judicial sale of the pledge; and this is clearly the proper course to pursue, where a demand cannot be made or notice given of the sale.¹ For a different reason, it is also the true remedy where the pledge is given to secure the performance of a contract, or to secure the payment of an unliquidated demand;² or where for any reason an account must be taken to ascertain the amount due to the pledgee.³ A foreclosure in equity is sometimes advisable for the purpose of securing an equitable sale or disposition of the property;⁴ and it is necessary to enable the pledgee to purchase the property—a permission which a court of equity may give in its decree, acting on the same principle which permits the mortgagee to purchase at a sale decreed in the foreclosure of a mortgage upon real estate.

§ 298. *Restitution.* The creditor's duty to restore the pledge on receiving satisfaction of his demand, does not arise out of the contract of pledge; it is the dictate of law, based on the equity of the situation.⁵ Hence a stipulation in a contract of pledge, defeating or waiving the right to redeem after a certain day, is invalid; our courts will not enforce it.⁶ Public policy does not permit the debtor to bargain away the right of redemption in a mortgage, in the act of executing it; or to surrender the right of redemption in a pledge, in the act of delivering it

¹ Cortelyou v. Lansing, 2 Caines' Cas. 201; Garlick v. James, 12 John. R. 159; Stearns v. Marsh, 4 Denio, 227; Strong v. National Mechanics' Banking Association, 45 N. Y. 718, 720.

² Vaupell v. Woodward, 2 Sand. Ch. R. 143. See Farmers & Merchants' Nat. Bank v. Rogers, 17 State Rep. 381. The Code provides that an action may be maintained to foreclose a lien upon a chattel, for a sum of money, in any case where such a lien exists at the commencement of the action, and that the action may be brought in any court of record or not of record which would have jurisdiction to render a judgment in an action founded upon a contract for a sum equal to the amount of the lien. See Code of Civil Pro. §§ 1737-1741. Such an action may be resorted to to foreclose the lien created by an assignment of property as security for a debt. Blake v. Crowley, 44 Hun, 344.

³ See Bartlett v. Johnson, 9 Allen (Mass.), 530; and the transaction disclosed in Van Blarcom v. Broadway Bank, 9 Bosw. 532; 37 N. Y. 540; and in Oneida Bank v. Ontario Bank, 21 N. Y. 490.

⁴ Donohoe v. Gamble, 38 Cal. 340.

⁵ Kingsbury v. Phelps, Wright (Ohio), 370; Beatty v. Sylvester, 2 Nev. 228; Merrifield v. Baker, 9 Allen, 29; 31 N. Y. 542; 13 Barb. 629.

⁶ Clark v. Henry, 2 Cowen, 324, 330-333; Houser v. Kemp, 3 Penn. St. 208; Williamson v. Culpepper, 16 Ala. 211; Bright v. Wagle, 3 Dana (Ky.), 252; Brownell v. Hawkins, 4 Barb. 491; Kimball v. Hildreth, 8 Allen (Mass.), 167; ante, § 250. In Lawrence v. Maxwell (53 N. Y. 19) it is held that an authority to transfer the stocks pledged at pleasure is inconsistent with a contract of bailment, and that a custom will not avail to work so great a change in the agreement.

as a collateral security. Besides opening the door to oppression, stipulations of this sort, carried into effect, would wholly change the nature of the transaction, converting the mortgage into a deed and the pledge into a contract for property.¹

A subsequent agreement made on equitable terms, waiving the right to redeem, may be enforced ; on the same ground that a mortgagor may afterwards convey his equity of redemption.²

§ 299. The proceeds of the pledge are to be applied first to the payment of the debt ; that being satisfied, the balance belongs to the pledgor. Where the pledge produces no income, and it is sold by the pledgee, the proceeds applicable to the debt are fixed, by deducting from the sum received the expenses incident to the sale, and the necessary expenses incurred in the preservation of the pledge.³ When the pledge consists of choses in action, and the pledgee endeavors to render them available by suit, he is entitled to recover the amount due upon them ; * recovering more than sufficient to satisfy his demand, he holds the balance in trust for the pledgor ;⁵ *i. e.*, the balance after defraying the expenses of collection.

There is every reason why the pledgee should be allowed his necessary expenses in keeping the pledge, or in rendering it available. Where he receives an indorsed note not yet due, as a collateral security, he is bound to have it duly protested, and to do those acts which will preserve the liability of the indorser ; and there can be no reason why he should not be reimbursed the expenses incurred by him in so doing.⁶ For the same reason he ought to recover or be allowed the expenses of a suit upon the collateral. The pledge is delivered for the mutual benefit of the parties to the contract ; and the collection, or the effort to collect the collateral security is as much for the benefit of the debtor as it can be for the creditor. Besides, the creditor is legally entitled to recover and receive the face of his demand ; and though it may be presumed that he willingly undertakes the personal trouble and care of the collection, it can hardly be inferred that he also assumes to pay the actual costs

¹ 2 Kent's Comm. 583.

² Stevens v. Bell, 6 Mass. 339. See West v. Crary, 47 N. Y. 423; Hathaway v. Brayman, 42 N. Y. 322. The pledgor may also waive his right to redeem by ratifying an irregular sale not sufficient of itself to cut off the right of redemption. Earle v. Grant, 14 R. I. 228; Hill v. Finigan, 62 Cal. 426; Roach v. Duckworth, 95 N. Y. 391, 402; Bryan v. Baldwin, 52 N. Y. 232.

³ Code Louisiana, Art. 3134.

⁴ Dewey v. Bowman, 8 Cal. 145; Comstock v. Smith, 23 Maine, 202; Soule v. White, 14 Maine, 436.

⁵ Treadwell v. Davis, 34 Cal. 601.

⁶ Russell v. Hester, 10 Ala. R. 535; ante, §§ 238-242.

and disbursements of the prosecution; since that would be to cast upon him another man's burden.¹

§ 300. The pledgee is bound to account for the income, profits or increase of the pledge. Where the pledge consists of stocks or securities bearing interest, he must account for the dividends or interest received thereon. As the title to the pledge does not pass, it is but a necessary conclusion, both of reason and law, that its fruits shall accrue to the owner; for it is the nature of property in all its forms to yield a revenue to its proprietor: lands, in the return of an annual rent; stocks, in the dividends which they yield; and notes and bonds, in the interest which they bear as the regular fruitage of the year.² On the same ground the bailee must account for the rental value or hire of chattels, where he gains a benefit from the use of them; and for the increase of domestic animals held in pledge.³ But he holds the income or increase as he does the pledge itself, to apply upon the debt.⁴

§ 301. Where the pledgee converts the pledge to his own use, or where the mortgagee of real or personal estate appropriates the property as his own, the transaction operates as a payment, to the extent of the value of the property. If the pledge or the estate covered by the mortgage be equal in value to the debt, the debt is paid.⁵ Though a mortgage of real estate does not convey the title, it does enable the mortgagee who acquires possession after forfeiture to hold the prem-

¹ *Comstock v. Smith*, *supra*; *Foot v. Brown*, 2 McLean, 369. It is now held that the creditor may bring suits on all the collaterals held by him and is to be allowed the costs and expenses paid by him in each suit, in account with his debtor. *Plants, etc., Co. v. Falvey*, 20 Wis. R. 200; *Hilton v. Waring*, 7 Wis. 492; *ante*, §§ 293, 242, 243; *Hurst v. Coley*, 22 Fed. Rep. 183.

² *Hasbrook v. Vandevort*, 4 Sandf. R. 74, 596; 9 N. Y. 153; *Van Rensselaer v. Jewett*, 5 Denio, 135; 2 N. Y. 135; *Putman v. Wyley*, 8 John. R. 532.

³ *Houton v. Holliday*, 1 Car. Law. Rep. 87; *Davenport v. Tarlton*, 1 Marsh. 244; *Ratcliff v. Vance*, 2 Rep. Con. Ct. 239; *Ross v. Norvell*, 1 Wash. 14; *Concklin v. Havens*, 12 John. R. 314; *Geron v. Geron*, 15 Ala. 588. The law declared in these cases remains good, though the subject has ceased to exist with the system of slavery.

⁴ All contracts to pay money give a right to interest as damages, from the time when the principal became due. The interest is the civil fruit of the moneys due. The revenue derived from labor is called wages; that derived from stock or property by the person who manages or employs it is called profit; that derived from money or debts due is called interest; these are all of essentially the same nature, being the regular harvest or return of either labor or capital, which is the produce of labor. *Reid v. Rensselaer Glass Factory*, 3 Cowen, 393; *S. C. 5 Cowen*, 587; *Smith's Wealth of Nations*; *Code Louisiana*, Arts. 537, 540; *Hume's History*, Ch. 33; *Williams v. Sherman*, 7 Wend. 109.

⁵ *Case v. Boughton*, 11 Wend. 106; *Morgan v. Plumb*, 9 Wend. 287, 292.

ises ;¹ and equity enables the mortgagor to redeem the property, by paying the debt for which it is held as a security ; thus satisfying the debt and restoring the surplus to the owner.² On redeeming, the mortgagee must ordinarily account for the net rents and profits ;³ and a purchaser in good faith, not aware of any right to redeem, may be allowed his expenses for valuable improvements.⁴

§ 302. Where a person delivers his property as a pledge for the payment of another man's debt, he is to be treated, it should seem, as standing in the situation of a surety ; and if he were to be so considered in all respects, he would be entitled to call upon the creditor to proceed and enforce the debt against the debtor.⁵ For some purposes, it is quite certain that he is entitled to protection as a surety.⁶ If by a sale or in some other way the proceeds of the pledge are applied in payment of the debt, he is evidently entitled to any remedy, lien, or security held by the creditor against the debtor or his property ; because up to the value of the pledge he stands as surety for the debt. In equity, if not at law, he has the right to reach any security or property of the debtor, held by the creditor, and have it applied upon the debt, or in satisfaction of his demand against the debtor, after he has paid the debt.⁷ He is entitled to the creditor's place by substitution, and the creditor is not allowed to deprive him of that right ;⁸ though not bound to active diligence, he is prohibited from doing any act prejudicial to the surety.⁹ And where the surety, or party standing in the place of a surety, tenders the expenses of active measures to collect, it may become the creditor's duty to enforce his demand against the principal debtor.¹⁰

§ 303. When a pledge is delivered to secure the performance of a

¹ *Phyfe v. Riley*, 15 Wend. 248; *Chase v. Peck*, 21 N. Y. 581, 586; *Stoddard v. Hart*, 23 N. Y. 556; *Madison Ave. Bap. Ch. v. Oliver St. Bap. Ch.*, 73 N. Y. 82.

² *Henry v. Davis*, 7 John. Ch. 49; 2 Cow. 324.

³ *Bell v. Mayor, etc., of N. Y.*, 10 Paige Ch. 49; *Wetmore v. Roberts*, 10 How. Pr. 51; *Madison Ave. Bap. Ch. v. Oliver St. Bap. Ch.*, 73 N. Y. 82.

⁴ *Thomas v. Evans*, 105 N. Y. 601; *Miner v. Beekman*, 50 N. Y. 339. There being no mistake in regard to the title, no allowance should be made for more than ordinary repairs. See *Scott v. Guernsey*, 48 N. Y. 106, 122.

⁵ *King v. Baldwin*, 2 John. Ch. 554; *S. C.* 17 John. R. 384; *Strong v. Wooster*, 6 Vt. 536.

⁶ *Ingalls v. Morgan*, 10 N. Y. 178; *Eddy v. Traver*, 6 Paige, 521.

⁷ *Gibbs v. Mennard*, 6 Paige, Ch. 258, 260; *Hayes v. Ward*, 4 John. Ch. 123; *Ellsworth v. Lockwood*, 42 N. Y. 89, 98; *Kohler v. Matlage*, 72 N. Y. 259, 268.

⁸ *Chester v. Bank of Kingston*, 16 N. Y. 336; *Mathews v. Aikin*, 1 N. Y. 595; *Lewis v. Palmer*, 28 N. Y. 271.

⁹ *Schroeppell v. Shaw*, 3 N. Y. 446; *Warner v. Beardsley*, 8 Wend. 194; *Bangs v. Strong*, 7 Hill, 250.

¹⁰ *Black River Bank v. Page*, 44 N. Y. 453.

contract, or to indemnify a surety, the pledgee has a right to retain it until the contract has been fulfilled, or until the surety has been discharged.¹ The rights and liabilities of the parties are fixed by the terms of the contract; and nothing is more common than to take securities of this nature, intended as an indemnity against liability or to insure the fulfillment of a contract.²

§ 304. A creditor sometimes takes several securities for the same debt, and he cannot be compelled to yield up either until the debt is paid.³ On discounting a note, there is nothing to prevent a bank from taking a chose in action from the maker and a transfer of stock from the indorser, as collateral security for its payment.⁴ And though the original debt be secured by a contract of guaranty, the creditor may at any time take a further collateral security for its payment, without impairing the prior securities. Provided he does not extend the time of payment by a valid contract, or by necessary implication, the new security received as a collateral does not affect the prior obligation.⁵ But the guarantor is discharged, where the creditor takes from the debtor a new note for the debt payable at a future day; thus extending the time of payment till the new note falls due.⁶

The creditor receiving from his debtor the note of a third person, past due, as collateral security, is not at liberty to extend the time of payment by a new contract; it is with better reason his duty to use diligence to collect it.⁷ And where a creditor receives a note or draft on a debt, without any agreement that it is received in payment, it is clearly his duty to take measures and have it properly protested.⁸

§ 305. When the debtor is the owner and holder of bonds, bills or notes made or drawn by other parties as business paper, his delivery of them as collateral security for the payment of his debt has the same legal effect as the delivery of chattels; it is a pledge of his property.

¹ *Jewett v. Warren*, 12 Mass. 300; *West v. Green*, 3 Mo. 219; *Allgear v. Walsh*, 24 Mo. App. 134.

² These cases relate to securities or pledges to indemnify an indorser. *Seacord v. Miller*, 13 N. Y. 551; *Denny v. Palmer*, 5 Fred. N. C. Law, 610, 625; *Holland v. Turner*, 10 Conn. 308; *Walters v. Munroe*, 17 Md. 154; *Haskell v. Boardman*, 8 Allen, 38; 43 N. H. 557; 14 Wis. 380.

³ *Chapman v. Clough*, 6 Vt. 123; *Western Transp., etc., Co. v. Kilderhouse*, 87 N. Y. 430.

⁴ *Union Bank v. Laird*, 2 Wheat. 290.

⁵ *Remsen v. Graves*, 41 N. Y. 471; *Cary v. White*, 52 N. Y. 138; *Taylor v. Allen*, 36 Barb. 294; 39 Barb. 610; *Halliday v. Hart*, 30 N. Y. 474.

⁶ *Hart v. Hudson*, 6 Duer, 294; *Place v. McIlvain*, 38 N. Y. 96.

⁷ *Wakeman v. Gowdy*, 10 Bosw. 208.

⁸ *Dayton v. Trull*, 23 Wend. 345; *Woodcock v. Bennett*, 1 Cowen, 711; *Manney v. Coit*, 80 N. C. 300. See *Gibson v. Tobey*, 53 Barb. 191.

The transaction is perfectly simple and plain. The debt is the consideration for the contract of pledge.¹

When the debtor is entrusted with bills or notes, drawn, accepted or indorsed for his accommodation without any restriction as to the use to be made of them, he may also pledge them as security for the payment of his debt; the transaction authorizes him to do so.²

When the debtor is entrusted with negotiable paper, bills and notes, drawn, accepted or indorsed *for a special purpose*, he has no right to transfer or use them for any other purpose; it is a breach of faith to do so; but since these instruments are negotiable, the party taking them and giving value for them before they are due, without any knowledge of the misuse or misappropriation, is allowed to hold and recover on them.³ He is not allowed to recover on them, where he takes them after they are due; * or where he does not give value for them.⁵

When a party having the custody, as bailee or agent, of negotiable bills and notes, wrongfully transfers them as collateral security for his own existing debt, the transferee is not allowed to hold them as against the true owner: not being a purchaser for value, it is not equitable that he should in this way acquire another man's property.⁶ Paying value for the paper and taking it fairly, the law allows him to hold it; because it is not inequitable, while it subserves the general convenience.⁷

§ 306. When an accommodation note is misappropriated, and delivered as a collateral security for indorsements to be made, and the same

¹ Ante, § 222.

² *Agawam Bank v. Strever*, 18 N. Y. 502; *Seneca Co. Bank v. Neap*, 3 N. Y. 442; *Bank of Chenango v. Hyde*, 4 Cowen, 567; *Continental Nat. Bank v. Townsend*, 87 N. Y. 8; *Grocers' Bank v. Penfield*, 69 N. Y. 502; *Tinsdale v. Murray*, 9 Daly, 446. But the pledgee cannot enforce an accommodation note against the accommodation maker for any amount beyond that for which it was pledged, nor for any debt for which it was not pledged. *Continental Nat. Bank v. Bell*, 125 N. Y. 38.

³ Ante, §§ 196, 197.

⁴ *Chester v. Dorr*, 41 N. Y. 279.

⁵ *Lawrence v. Clark*, 36 N. Y. 128. The pledgee of an accommodation note, which has been diverted from the purpose for which it was made by pledging it to secure a debt past due, cannot enforce it against the accommodation maker or indorser. *Grocers' Bank v. Penfield*, 69 N. Y. 502; *Continental Nat. Bank v. Bell*, 125 N. Y. 38, 42; *United States Nat. Bank v. Ewing*, 131 N. Y. 506. The transferee of negotiable paper who takes it knowing that it is transferred in violation of conditions or limitations imposed by an accommodation maker, cannot hold and enforce it against such maker. *Benjamin v. Rogers*, 126 N. Y. 60.

⁶ *Coddington v. Bay*, 20 Johns. R. 637; *Stalker v. McDonald*, 6 Hill. 93. See *Weaver v. Barden*, 49 N. Y. 286; *Cary v. White*, 52 N. Y. 138.

⁷ *Park Bank v. Watson*, 42 N. Y. 497; *Boyd v. Cummings*, 17 N. Y. 101; *Brookman v. Metcalf*, 32 N. Y. 591; *Bank of N. Y. v. Vanderhorst*, 32 N. Y. 553, 556.

are made in good faith on the strength of it, the party so taking it is to be treated as a *bona fide* holder for value in the commercial sense—a holder for value to the extent of the liability assumed.¹ So where goods are sold on an agreement that the notes of third parties are to be delivered as collateral for the purchase money, the seller receiving them presently or within a short time after the goods are delivered holds them for value.² And he is entitled to recover on paper of this kind, wherever he has parted with value in any form on taking it, or assumed any new liability, or omitted any act affecting his rights on the strength of the paper.³

§ 307. The general rule that the party selling or transferring property can convey no better title than he himself possesses, applies to mortgages and pledges. The owner cannot be divested of his property without his consent, either expressed or implied; ⁴ and hence as a rule the pledgee takes no greater interest than the pledgor possessed; ⁵ and no greater interest than the terms of the contract do actually convey.⁶

It is an exception to the general rule, which allows a purchaser of chattels in good faith, from a party who acquired them by a fraudulent purchase, to hold the property as against the defrauded seller; an exception based upon this consideration, that as between two innocent persons, he who has parted with the possession of his goods must yield to a *bona fide* purchaser from the party to whom the possession is confided, with the *indicia* of title.⁷ And the same exception is enforced in favor of a party making advances on the goods, on a transfer of the title as a collateral security; ⁸ and in favor of a party making a loan or discount, on a transfer of stocks made by a person invested with the title.⁹ The equitable ground supporting this exception, does not extend

¹ Williams v. Smith, 2 Hill, 301; Merritt v. Northern R. R. Co., 12 Barb. 605; Watson v. Cabot Bank, 5 Sandf. 423; Case v. Mechanics' Bank Association, 4 N. Y. 166; Smith v. Mulock, 1 Robt. 569. See Farmers & Citizens' Nat. Bank v. Noxon, 45 N. Y. 762.

² Fenly v. Pritchard, 2 Sandf. 151.

³ White v. Springfield Bank, 3 Sandf. 222; Youngs v. Lee, 12 N. Y. 551; Brown v. Leavitt, 31 N. Y. 113; Meads v. Merchants' Bank, 25 N. Y. 143; Bank of St. Albans, v. Gilliland, 23 Wend. 311; Ward v. Howard, 88 N. Y. 74; Phoenix Ins. Co. v. Church, 81 N. Y. 218; First Nat. Bank v. Tisdale, 84 N. Y. 655; Bookheim v. Alexander, 64 Hun, 458; Clothier v. Adriance, 51 N. Y. 322; Mayer v. Heidelberg, 123 N. Y. 332. These cases illustrate the operation of the rule.

⁴ Cleveland v. State Bank, 16 Ohio St. 336.

⁵ Campbell v. Parker, 9 Bosw. 322.

⁶ Luckey v. Gannon, 1 Sweeny, 12.

⁷ Mowrey v. Walsh, 8 Cowen, 238; Rowley v. Bigelow, 12 Pick. 307; Ash v. Putman, 1 Hill R. 302; Dows v. Greene, 24 N. Y. 638, 644; Lacker v. Rhoades, 45 Barb. 499.

⁸ Winne v. McDonald, 5 Bosw. 130; 39 N. Y. 233.

⁹ McNeil v. Tenth National Bank, 46 N. Y. 325.

to the case of a pledge received as security for an antecedent debt; nor does it extend to a case where the transferee or party dealing with the apparent owner, has knowledge of the title.¹ The equity arises only in favor of a purchaser, in good faith, for value; or in favor of one who comes into substantially the same position as a purchaser, for a valuable consideration.

§ 308. Where promissory notes are delivered as collateral security for the payment of a usurious loan, which is declared illegal and void by the statute, the lender cannot recover upon them against the borrower; nor can the party to whom he transfers them collect and apply the proceeds on an existing debt. As collateral paper, the notes must abide the fate of the principal debt to secure which they were delivered.² The transfer as security for a debt created in violation of law is itself illegal; the collateral partakes of the nature of the principal contract; hence the party taking cannot hold the pledge, as against the pledgor.³ But it is well settled that a stranger to the contract cannot insist upon the invalidity of a usurious security;⁴ it follows that the makers of a valid security, delivered as collateral on a usurious loan, cannot interpose a defense on the ground of usury, when sued on the valid collateral; not being parties or privies, they cannot litigate the validity of the transfer.⁵

§ 309. Whatever discharges and satisfies the original debt, necessarily releases all accessory obligations; all collaterals and contracts of suretyship. A discharge of the debtor as a bankrupt or as an insolvent does not have that effect; it does not release a surety bound for its payment, nor can it have any effect upon the contract of pledge.⁶ The assignee of the insolvent or bankrupt takes subject to the lien; and he has the right to take back the pledge on the same terms as the debtor might have done.⁷ That is to say, the pledge being honestly made and not

¹ Reeves v. Smith, 1 La. Ann. R. 379; Porter v. Parks, 49 N. Y. 564.

² Bell v. Lent, 24 Wend. 230. See Treadwell v. Archer, 76 N. Y. 196. The vice of usury follows a promissory note into the hands of a *bona fide* holder. Clafin v. Boorum, 122 N. Y. 385.

³ Fish v. De Wolf, 4 Bosw. 573; Gaither v. Farmers & Mechanics' Bank, 2 Peters' U. S. R. 37; Ramsdell v. Morgan, 16 Wend. 574; Keutgen v. Parks, 1 Sandf. 60.

⁴ Bullard v. Raynor, 30 N. Y. 197; Billington v. Wagoner, 33 N. Y. 31; Kay v. Whittaker, 44 N. Y. 565.

⁵ Williams v. Tilt, 36 N. Y. 319.

⁶ Bowery Savings Bank v. Clinton, 2 Sandf. 113; Storm v. Waddell, 2 Sandf. Ch. R. 494, 525. See Brown v. Nichols, 42 N. Y. 26, as to the lien acquired upon equitable assets by suit, Davenport v. Kelly, 42 N. Y. 193; and as to the effect of a discharge, see Ocean National Bank v. Olcott, 46 N. Y. 12.

⁷ A preference may be void under the Bankrupt Act, and valid under the State law. Dodge v. Sheldon, 6 Hill, 9; Seaman v. Stoughton, 3 Barb. Ch. R. 344.

coming within the prohibition of the statute, it creates a vested interest in the pledgee, so that only a right to redeem vests in the assignee. The discharge under the old bankrupt law was quite absolute; it released the bankrupt from all provable debts, claims, liabilities and demands; it extinguished them as subsisting causes of action. It did this without assuming to invalidate any collateral security; it gave the debtor a personal release, more efficient and much like the discharge granted to an insolvent under the State law.¹

The debtor's incapacity to bind himself, from infancy or from coverture, under the common law, does not avail a surety; and on the same ground, the mere invalidity of the original debt, constituting a defense personal to the debtor, does not invalidate a contract of pledge, or a guaranty of payment made by a party competent to contract.² The new engagement is not so based upon the original, that a defense on the ground of a want of legal capacity to incur the debt will avail to annul the collateral contract.³

§ 310. A creditor holding his debtor's property in any manner as a security for the payment of his demand, and contract of suretyship therefor, is obliged in equity to resort to the property, as the primary fund for the satisfaction of the debt; because it is just that the debtor's property should be first applied in the payment of his debts.⁴ In taking collateral securities from the debtor the creditor acts for the benefit of the surety; and he is bound, after taking them, to hold them for the surety's protection.⁵ And if he fails in this duty, he discharges the surety; but it is adjudged that an indorser is not a surety in such a

¹ Tooker v. Bennett, 3 Caines' R. 4; Moore v. Paine, 12 Wend. 123, 126; Ellsworth v. Caldwell, 27 How. Pr. 188; Ford v. Andrews, 9 Wend. 312; Cook v. Whipple, 55 N. Y. 150; Wooden v. Frazee, 6 J. & S. 190. There is now no bankrupt law existing in the United States; but as the echoes of the act are still to be heard in our courts, it cannot be wholly ignored.

² That the surety may be bound though the principal is an infant or a married woman, see *St. Albans Bank v. Dillon*, 30 Vt. 122; *Kimball v. Newell*, 7 Hill, 116; *Whitworth v. Carter*, 43 Miss. 61; *Hicks v. Randolph*, 59 Tenn. 352; *Jones v. Crosthwaite*, 17 Iowa, 333. The pledge by an infant may be void; but it is not void on the ground that the original debt is invalid. *Kimball v. Newell*, 7 Hill, 116; *Edwards on Bills and Notes*, 218; and 20 Pick. 467; 30 Vt. 122; 7 N. H. 368; *Davis v. Statts*, 43 Ind. 103; *Baldwin v. Van Deusen*, 37 N. Y. 487.

³ *Connecticut M. Life Ins. Co. v. The Cleveland C. C. R. R. Co.*, 41 Barb. 9; *Mann v. Eckford's Exors.*, 15 Wend. 502.

⁴ *Vartie v. Underwood*, 18 Barb. 561. Here a mortgage covered the principal debtor's and also his surety's property; held that the proceeds of the debtor's property must be first applied. *Wright v. Austin*, 56 Barb. 13; 50 N. Y. 369; 56 N. Y. 494.

⁵ *Hayes v. Ward*, 4 John. Ch. 123; *Third Nat. Bank v. Shields*, 55 Hun, 274; *Grow v. Garlock*, 97 N. Y. 81.

sense that he is entitled to the protection of this rule.¹ And it is not under all circumstances the creditor's duty to exhaust the fund in his hand before proceeding against the surety.²

§ 311. The pledgee is not bound to restore the pledge where it has been lost without any fault on his part; but where he refuses to return the pledge on a tender of the debt due, and retains it until it becomes worthless, he must account for its value at the time of the tender; being equal in value to the debt at that time, he is obliged to accept it in full satisfaction.³ His detention of the property being wrongful, the law holds him answerable for it at all events during the unlawful detention; a rule of liability of which he cannot complain, since his refusal to restore the property is an act of appropriation which renders him liable for its value.⁴

§ 312. *Remedies.* A right of property includes the remedies given for its violation, and the means furnished by the law for its protection; and hence our investigations constantly branch out into the practical vindication of acknowledged rights. Having followed this method thus far, but little remains to be said under this division of the subject. For a violation, by the pledgee, of the residuary or general right of property remaining in the pledgor, the latter has an immediate remedy; by a suit on the contract, or by an action based on the tortious act. He is entitled to recover either the property, or the damages he has sustained, or his interest in the pledge.⁵ Under ordinary circumstances his remedy is by an action at law; and the action is to be chosen with reference to the existing relations of the parties.⁶ The bailee's lien entitles him to retain the property; but where he attorns to another party claiming the title, he is not allowed to hold the property under pretense of a lien upon it.⁷

¹ *Pitts v. Congdon*, 2 N. Y. 352; *First Nat. Bank v. Wood*, 71 N. Y. 405; *Third Nat. Bank v. Shields*, 55 Hun, 274.

² *Loud v. Sergeant*, 1 Edw. Ch. 164; *Gary v. Cannon*, 3 Ired. Eq. 64.

³ *Griswold v. Jackson*, 2 Edw. Ch. 461; *Hope v. Lawrence*, 1 Hun, 317; *Loughborough v. McNevin*, 74 Cal. 250. A tender of the amount due destroys the lien of the pledge. *Norton v. Baxter*, 41 Minn. 146; *Loughborough v. McNevin*, 74 Cal. 250; *Haskins v. Kelly*, 1 Rob. 160; *Cass v. Higenbotam*, 100 N. Y. 248; *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Tiffany v. St. John*, 65 N. Y. 314, 318.

⁴ *Coggs v. Bernard*, 2 Ld. Raym. 909; *Mitchell v. Williams*, 4 Hill, 13; *Tiffany v. St. John*, 65 N. Y. 318.

⁵ *Holbrook v. Wight*, 24 Wend. 169; *Winter v. Coit*, 7 N. Y. 288; *Covill v. Hill*, 6 N. Y. 374; *Wood v. Orser*, 25 N. Y. 348; *Henry v. Marvin*, 3 E. D. Smith, 71; *Cass v. Higenbotam*, 100 N. Y. 248, 252.

⁶ *Ante*, §§ 38-42, 60, 61, 86, 97, 101-104, 156, 257, 267; *Luckey v. Gannon*, 37 How. Pr. 134; *supra*, *Wood v. Orser*.

⁷ *Holbrook v. Wight*, *supra*. See *Cook v. Holt*, 48 N. Y. 275.

§ 313. After the debt secured by a chattel mortgage becomes due, the legal title to the chattels vests in the mortgagee; and after this the mortgagor's only remedy is by a bill in equity to redeem¹—an action in which he is entitled to have an account of the rents, profits, and income derived from the property.² The pledgor has the same remedy, where he has a right to demand a retransfer of the security, stocks, and an account of the dividends received thereon;³ or where the legal remedy is insufficient to afford him an adequate protection, as where the pledge consists of negotiable securities, and an injunction becomes necessary to prevent a wrongful transfer of the paper;⁴ or where a discovery is sought, or a specific performance is necessary, to protect the pledgor.⁵ A tender or payment of the debt must precede the action to redeem.⁶ The debt remaining unpaid in whole or in part, a receiver cannot be appointed over a mortgagee in possession; and where there is no allegation showing his want of responsibility, equity will not restrain him from selling the property.⁷ The danger is too remote.⁸ A threatened abuse of legal power, the effect of which is sure to work an immediate injury, justifies the interposition of an equitable remedy.⁹

§ 314. A court of equity has no general jurisdiction over actions to redeem personal property held in pledge, without some other circumstances rendering its interference necessary.¹⁰ The facts must show that the complainant is entitled to an equitable remedy; a discovery, a specific transfer of property, an injunction, or that an account must be taken.¹¹ To sustain a bill for an account, there must be mutual demands, or a series of transactions on one side and of payments on the other.¹²

The objection, that the plaintiff has a remedy at law, must be set up

¹ Willard's Eq., 457.

² Pratt v. Stiles, 17 How. Pr. 211, 222; 17 N. Y. 80, 84.

³ Hasbrouck v. Vandervoort, 4 Sandf. 74; Kemp v. Westbrook, 1 Ves. Sen. 278; 9 N. Y. 153; Cowles v. Whitman, 10 Conn. 121; 29 Cal. 142.

⁴ Brown v. Runals, 14 Wis. 693. See Illinois v. Delafield, 8 Paige Ch. 527; S. C. 2 Hill, 159, 177.

⁵ Benedict v. Gilman, 4 Paige Ch. 53, 526; 5 id. 9.

⁶ Crary v. Smith, 2 N. Y. 60; 4 Sandf. 74.

⁷ Bayaud v. Fellows, 28 Barb. 451; Patten v. Acces. Transit Co., 4 Abbott, 235; Quinn v. Brittain, 3 Edw. Ch. R. 314; Quarrell v. Beckford, 13 Ves. 377.

⁸ See Reubens v. Jael, 13 N. Y. 488.

⁹ Ford v. Ransom, 39 How. Pr. 420; 8 Abbott Pr. (N. S.) 416: here the mortgagee was restrained from taking possession contrary to his stipulation. See Parker v. Garrison, 61 Ill. 250; Pattison v. Gilford, Law Rep. 18 Eq. 259.

¹⁰ Glenn v. Imri, 3 You. & Coll. 436; Hirst v. Pierce, 4 Price, 339; Jones v. Smith, 2 Ves. J. 372; Demenbray v. Metcalf, 1 Vern. 698.

¹¹ Durant v. Einstein, 5 Robt. 423.

¹² Porter v. Spencer, 2 John. Ch. R. 169; Moses v. Lewis, 12 Price, 502; 13 Ves. 275.

in the answer; it comes too late on the hearing of the cause.¹ We accordingly find many cases disposed of in a court of equity for which the law provides a sufficient remedy.² And there are many cases in which courts of law and equity have a concurrent jurisdiction.³ Thus, the assignee of a factor having a legal remedy may file a bill for the settlement of accounts between him and his principal.⁴

§ 315. A general pledge given to a creditor to secure a running account, or all demands that may become due to him from the debtor, authorizes a suit in equity for an account.⁵ And where the collaterals have been transferred, the purchasers or assignees must be made parties to the action; otherwise the court cannot make a proper decree authorizing a redemption.⁶ In some cases, as in a pledge of negotiable paper or stocks with a power to sell, a transfer will convey the title disencumbered, and thus defeat a specific redemption; leaving the court to make a decree adjusting the equities between the parties, upon principles applicable to the transaction and present situation of the parties.

§ 316. When the general owner sells the property held in pledge, the purchaser necessarily takes it subject to the rights of the bailee; that is to say, he acquires the title to the property, including the remedies given by law for its protection. As purchaser he is entitled to redeem, on the same terms as the original owner: on a tender of the amount due, the pledgee must deliver up the property to him; a refusal to do so on demand is a conversion.⁷ The owner's right

¹ *Truscott v. King*, 6 N. Y. 147, 165; *Le Roy v. Platt*, 4 Paige, 77; *Town of Mentz v. Cook*, 108 N. Y. 504; *Grandin v. Le Roy*, 2 Paige, 509; *Cox v. James*, 45 N. Y. 557; *Green v. Milbank*, 3 Abb. N. C. 138; *Pam v. Vilmar*, 54 How. 235; *Bell v. Spotts*, 8 Jones & Sp. 552; *Crisfield v. Murdock*, 127 N. Y. 315; *Brown v. Korn*, 127 N. Y. 224.

² *Hart v. Ten Eyck*, 2 John. Ch. R. 100. See *Mahoney v. Caperton*, 15 Cal. 313; and *Hunsacker v. Sturgis*, 29 Cal. 142, 267; and *Donohoe v. Gamble*, 38 Cal. 340; *Bradley v. Bosley*, 1 Barb. Ch. 125.

³ *Mayne v. Griswold*, 3 Sandf. 363; *Foot v. Farrington*, 41 N. Y. 164.

⁴ *Wilson v. Mallett*, 4 Sandf. 112; 7 Robt. 564.

⁵ *Conyngham's Appeal*, 57 Penn. St. 474; *Beatty v. Sylvester*, 2 Nev. 228; *Diller v. Brubaker*, 52 Penn. St. 498.

⁶ *Lewis v. Varnum*, 12 Abbott, 305.

⁷ *Franklin v. Neate*, 13 Mees. & Wels. 481; plaintiff bought a chronometer under a pledge for £15, and tendered the amount due and demanded the watch; held he could recover in the action of trover. See also *Hunt v. Hotton*, 13 Pick. 216, and *Magee v. Toland*, 8 Porter, 36. One who purchases from the general owner property pledged for advances, with knowledge and notice of the lien of the pledgee, and who receives the property from the latter with notice of his claim of a lien thereon for a specific amount, takes the property with the obligation to pay the lien. *Carrington v. Ward*, 71 N. Y. 360.

to sell the goods, pending the pledge, draws after it these rules of law.¹

If the general owner become bankrupt, his assignee succeeds to his title and rights;² the bailee retaining his lien unaffected. The same rule holds good where the bailee is summoned as a trustee of the general owner,³ or where an attachment is procured against him; the process takes effect subject to the rights of the bailee; it enables the plaintiff to reach the interest of the general owner, and nothing more.⁴ The officer cannot, unless authorized by statute, seize and sell the property.⁵ A factor under advances is a pledgee entitled to hold the goods; so that an attachment binds only the surplus.⁶

§ 317. The pledgee's right to file a bill and have a judicial sale of the pledge is settled;⁷ and it has been enforced so as to enable the creditor to regain the possession of the pledge, obtained from him through a fraudulent device, and thus to secure a sale and the benefit of his lien.⁸ Here the pledgee has a right to bring an action of trover for the property; a remedy which is less efficient under many circumstances.⁹ At law the pledgee can only recover his lien by a recovery of the specific property; because we have no form of action at law, under which a lienholder can regain his lien, as a thing distinct from the property. Based on a right to detain the property, the lien is not necessarily defeated by a loss of possession, where the creditor does not voluntarily part with the goods, or intentionally surrender his lien.¹⁰

§ 318. The remedy depends upon the circumstances and the nature of the transaction. A renewal or change in the form of the debt secured

¹ *Hodges v. Hurd*, 47 Ill. 363.

² *Raleigh v. Atkinson*, 6 Mees. & Wels. 670.

³ *White M. Bank v. West*, 46 Me. 15.

⁴ *Giles v. Nathan*, 5 Taunt. 558; *Curtis v. Norris*, 8 Pick. 280; *Bank of S. C. v. Levy*, 1 McMullen, 430; *Nolan v. Crook*, 5 Humph. 312; *Black v. Zacha*, 3 How. U. S. 483; *Cook v. Kelly*, 9 Bosw. 358.

⁵ *Brownell v. Carnley*, 3 Duer, 9.

⁶ *Patterson v. Parry*, 5 Bosw. 518; and see *Taylor v. Turner*, 87 Ill. 296.

⁷ *Demandray v. Metcalf*, Prec. in Chan. 419; *Kemp v. Westbrook*, 1 Ves. Sen. 278; *Tucker v. Wilson*, 1 P. Wms. R. 261; 2 Kent's Comm. 582; ante, § 297; *Smith v. Coale*, 12 Phila. (Pa.) 177.

⁸ *Coleman v. Shelton*, 2 McCord's Ch. 126. In this case a slave was delivered in pledge to work out a debt; and the pledgor enticed away the slave. See *Donohoe v. Gamble*, supra.

⁹ *Hutton v. Arnett*, 51 Ill. 198; ante, § 269. See *Bruley v. Rose*, 57 Iowa, 651.

¹⁰ *Allen v. Spencer*, 1 Edm. R. 117; *McCaffery v. Wooden*, 62 Barb. 316; 5 Denio, 269; 1 Sandf. 248. It can only be created by a delivery of the possession. *Muller v. Pondir*, 6 Lansing, 472.

does not affect the pledge. The recovery of a judgment for the amount of the debt does not release the pledge; nor does the taking of a higher security therefor.¹ Indeed, it is quite common to give a judgment or a bond and mortgage to secure either an existing debt or future advances; and the collateral stands good until the debt or the advances are paid.² The purpose for which the security is given may be shown by parol testimony; and necessarily the action taken or payments made under the arrangement.³ Thus the collateral is made to accomplish the intent of the parties, with but little embarrassment arising from artificial rules.

A second security of the same degree, given for the same debt, does not release the first;⁴ as where a second bond or second mortgage is given for the same debt. A security of a higher nature like a bond extinguishes one of a lower nature like a note, when both are given for the same debt.⁵ A judgment recovered upon a judgment does not extinguish it; both being of the same grade.⁶ But these rules relating to the doctrine of merger do not apply where the higher security is taken as additional or collateral security for the payment of the debt.⁷ The rule that a security of a higher nature extinguishes inferior securities, only applies to the state or condition of the debt itself, and means no more than this: that when an account is settled by a note, or a note changed to a bond, or a judgment taken upon either, the debt, as to its original or inferior condition, is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such inferior condition was evidenced lose their validity. It has never been applied to the extinguishment of distinct collateral securities,

¹ *Dunham v. Dey*, 15 John. R. 555; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Curtis v. Leavitt*, 15 N. Y. 14, 162; *Day v. Leal*, 14 John. 404; *Brinkerhoff v. Lansing*, 4 John. Ch. 65.

² *Truscott v. King*, 6 N. Y. 147; *Mead v. York*, 6 N. Y. 449. When a creditor holds a note and a bond and mortgage for the same debt made by the same parties, his remedy is upon the higher security. *Miller v. Watson*, 5 Cowen, 195; *Tylee v. Yates*, 3 Barb. 222; *Lane v. Shears*, 1 Wend. 433.

³ *McKinster v. Babcock*, 26 N. Y. 378; 6 Duer, 208.

⁴ *Gregory v. Thomas*, 20 Wend. 17; *Walker v. Henry*, 85 N. Y. 130; *Hill v. Beebe*, 13 N. Y. 556; *Board of Education v. Fonda*, 77 N. Y. 350; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Shuler v. Boutwell*, 18 Hun, 171.

⁵ *Miller v. Watson*, 5 Cowen, 195; *Tylee v. Yates*, 3 Barb. 222.

⁶ *Andrews v. Smith*, 9 Wend. 53, 54. See *Millard v. Whittaker*, 5 Hill, 408; *Jackson v. Shaffer*, 11 John. R. 513, 516.

⁷ *Day v. Leal*, 14 John. 404; *Youngs v. Stahelin*, 34 N. Y. 258; *Bank of Chenango v. Hyde*, 4 Cowen, 567, 575; *Taggard v. Curtenius & Jones*, 15 Wend. 155, 157; *Kelsey v. Western*, 2 N. Y. 500, 510; *Barts v. Peters*, 9 Wheat. 556; *Hill v. Beebe*, 13 N. Y. 556.

whether superior or inferior in degree. These are to be canceled by satisfaction of the debt, or voluntary surrender alone.¹

§ 319. The creditor's failure to appropriate the collateral to the satisfaction of the debt, or to preserve its validity and value, does not operate upon the debt itself.² The neglect may be available as a defense to an action on the debt, or made the basis of an action to recover the damages sustained by a breach of the contract of pledge, or by the breach of another contract under it made with a third party. To illustrate: a debtor delivers to his creditor an indorsed note made by a third party as a collateral security for the payment of the debt, the creditor deposits it with his bank for collection, and the bank neglects to charge the indorsers thereon; here the creditor as pledgee of the note has a cause of action against the bank, and his recovery against the bank is to be applied upon the debt secured. But if the debtor, before suit against the bank, comes forward and pays his debt and takes up the collateral note, he is entitled to recover his damages against the bank.³

The creditor holds all collaterals as a trustee, to be collected for the benefit of the debtor; and whenever he transfers them absolutely, without authority, he takes them at their face, in satisfaction to that extent of the principal debt.⁴ The debtor can ask nothing more, and he is not obliged to accept anything less.⁵

§ 320. When a creditor receives a collateral note for collection, the proceeds to be applied upon his demand, he assumes the duty of a collecting agent; and is liable for any failure in diligence, upon the same principle as if the two contracts were entirely separate.⁶ He is bound like an attorney to use reasonable diligence by suit, to collect on the note; he is bound by the terms of his contract, or by the necessary legal effect of those terms.⁷ A suit must be brought and prosecuted with

¹ *Butler v. Miller*, 1 Denio, 407; S. C. 5 Denio, 159; S. C. 1 N. Y. 496.

² *Taggard v. Curtenius & Jones*, supra.

³ *McKinster v. Bank of Utica*, 9 Wend. 46, 48; S. C. 11 Wend. 473; *Whitney v. M. Un. Ex. Co.*, 104 Mass. 152.

⁴ *Hawks v. Hinchcliffe*, 17 Barb. 492, 502.

⁵ *Townsend v. Borgy*, 57 N. Y. 665.

⁶ *Buckingham v. Payne*, 38 Barb. 81; *Semple & Birge Manuf. Co. v. Detwiler*, 30 Kans. 386; *Harper v. Second Bank*, 12 Lea (Tenn.), 678; *Alexander v. Alexander*, 64 Ind. 541; *Briggs v. Parsons*, 39 Mich. 400; *Colquitt v. Stultz*, 65 Ga. 305; *McQueen's Appeal*, 104 Pa. St. 596; *Hanna v. Holton*, 78 Pa. St. 334; *Wills v. Wills*, 53 Vt. 1; *Whitin v. Paul*, 13 R. I. 40; *Butterton v. Roope*, 3 Lea (Tenn.), 215; *Lamberton v. Winslow*, 12 Minn. 232; *Rumsey v. Laidley*, 34 W. Va. 721.

⁷ *Morris v. Wadsworth*, 11 Wend. 104; S. C. 17 Wend. 112; *Hoard v. Garner*, 10 N. Y. 261.

diligence; as it must to charge a guarantor of the collection.¹ It is not enough to place the demand in the hands of an attorney; diligence must be used in the effort to collect, according with the contract,² and fulfilling the duty assumed.³

§ 321. We have seen that a creditor is entitled to retain a pledge, after his demand has been barred by the statute of limitations; ⁴ on the same ground that a mortgagee in possession cannot be dispossessed, without satisfying the debt due to him.⁵ In its early form, the statute did not in terms apply to suits in equity; and the practice in courts of equity was to apply the principle of the statute so as to defeat stale and deserted claims; in a court of equity the statute was adopted as a rule of reason. In its recent form the statute applies to suits for relief in equity, as well as to suits at law; ⁶ and it is interpreted as a statute of repose. An action to redeem against a mortgagee in possession is a suit in equity, and it is to be brought within the time limited for such actions after the defendant enters into possession—claiming the title.⁷ But the statute does not commence running where the mortgagee enters and continues in possession avowedly as mortgagee, for the reason that it is a continuing right of the owner to discharge the mortgage and thus regain the possession of the land. Does not the same rule, based on the same reason, apply in favor of the pledgor so long as the pledgee retains the pledge and does nothing inconsistent with the contract? The pledgee here cannot gain the shadow of a right by prescription, because there is here no foundation on which to base the right; and the statute does not commence to run until a present right of action to redeem accrues.⁸ Can it be held that the action to redeem accrues

¹ *Craig v. Parkis*, 40 N. Y. 181.

² *Hoard v. Garner*, *supra*; *Eddy v. Stanton*, 21 Wend. 255; *Plymouth County Bank v. Gilman*, 6 Dak. 304. If the payee of a note deposits it with a bank as collateral, at the same time guaranteeing it, he and not the bank must bear the loss if the maker becomes insolvent, although the bank has held the note for eighteen months after it matured, in the absence of a request by the payee that it be collected. *City Savings Bank v. Hopson*, 53 Conn. 453.

³ *Miller v. Proctor*, 20 Ohio St. 442.

⁴ *Jones v. Merchants' Bank of Albany*, 6 Robt. 162. See dissenting opinion, 4 Robt. 221. See *ante*, § 249.

⁵ *Phyfe v. Riley*, 15 Wend. 248; *Chase v. Peck*, 21 N. Y. 581; *Calkins v. Calkins*, 3 Barb. 305.

⁶ *Foot v. Farrington*, 41 N. Y. 164.

⁷ *Miner v. Beekman*, 50 N. Y. 337; *Knowlton v. Walker*, 13 Wis. 264; 14 *id.* 286. See Code of Civil Procedure, § 379; *Shriver v. Shriver*, 86 N. Y. 575.

⁸ *Jones v. Thurmond's heirs*, 5 Texas, 318, 321, holds that the statute does not commence to run until the pledgee does some act which shows a determination to dissolve the relation of pledgor and pledgee. *Gilmer v. Morris*, 35 Fed. Rep. 682,

before the bailor demands a return of the property and tenders a satisfaction of the debt? It seems not; the action of trover may be maintained within six years after a refusal to restore on demand.¹

§ 322. After a long lapse of time it often becomes inequitable to allow the debtor to redeem; it is so where the pledge does not exceed in value the debt when it becomes due, and both parties tacitly assume for many years that the pledge shall be taken in payment of the debt.² Time works changes in the relations of the parties; and the law recognizes this fact of universal experience in adjusting the rights of property. It limits the period of litigation. It prescribes the time within which all demands, including those which are most just and equitable, must be prosecuted.³ It leaves but one question open for investigation: when did the cause of action accrue? That being ascertained, the action must be brought within the years given for that purpose.⁴ In analogy with other similar trusts, the statute does not begin to run, as a general rule, until there has been an open denial or repudiation of the trust, or some notice of an adverse claim.⁵

holds that until the pledgee repudiates the title of the pledgor the holding is not adverse so as to set the statute of limitations in motion in the pledgee's favor. This case was reversed in the Supreme Court of the United States on the ground of want of jurisdiction in the court below, and on that ground only. *Morris v. Gilmer*, 129 U. S. 315. See *Gilmer v. Morris*, 43 Fed. Rep. 456.

¹ *Roberts v. Berdell*, 61 Barb. 37; S. C. 15 Abb. N. S. 177; 52 N. Y. 644; *Purdy v. Sistare*, 2 Hun, 126. See Code of Civil Procedure, § 410; *Fry v. Clow*, 50 Hun, 574; *Humphrey v. Clearfield Bank*, 113 Pa. St. 417.

² *Waterman v. Brown*, 31 Penn. St. 161. An action to redeem cannot be sustained after the lapse of many years. In this case a loan of \$6,932 was made on a pledge of bank stock as a collateral security, the stock being transferred to the lender, with authority to sell it and pay the note. For eleven years after the note fell due nothing was done by the debtor. The notes outlawed in six years, and the stock was then actually worth less than the amount due on the notes. Five years afterward, the stocks having risen in value, a suit was brought by the debtor to redeem; and the court refused a decree in his favor and intimated an opinion that his suit was barred by a delay of six years after the debt fell due. *Henry v. Tupper*, 3 Williams, 29 Vt. 358. A court of equity may grant relief from a forfeiture; for example, from the forfeiture of an estate conditioned for the maintenance and support of the grantee, where the forfeiture was accidental and unintentional, and not attended with irreparable injury. But it rests in the sound discretion of the court when relief shall be granted in this class of cases.

³ *Rundle v. Allison*, 34 N. Y. 180.

⁴ *Roberts v. Sykes*, 30 Barb. 173, holds that an action to redeem stocks pledged by a transfer, on a loan of money, must be brought within ten years after the money becomes due. SUTHERLAND, Justice. See *Calkins v. Calkins*, 3 Barb. 305; S. C. 20 N. Y. 147.

⁵ *Purdy v. Sistare*, 2 Hun, 126; Angell on Lim. §§ 173, 178, 179, 180; ante, §§ 251-253; and see *Gilmer v. Morris*, 35 Fed. Rep. 682; 43 Fed. Rep. 456; *Marr v. Kimbel*,

§ 323. A debt is not protected from the statute of limitations because accompanied by a pledge as a collateral security; it is not on that account the less subject to the mischief against which the statute was intended to guard.¹ If the debt be contracted and the pledge given for its payment at the same time, and the debt be suffered to pass under the bar of the statute, the creditor ought not to be deprived of the security. Though unable to collect his debt by suit, it does not seem to be just or reasonable to deprive him of the pledge received on the debt, with an implied power to sell it and apply the proceeds;² more especially, since the statute operates upon the remedy and not upon the debt itself.³

§ 324. A payment made upon a debt renews it. It is an acknowledgment by the debtor of his liability to pay the whole demand; and from this acknowledgment the law implies a new promise by the debtor to pay the residue. The law does not imply such a promise from a part payment by the debtor's assignee; or from a payment made to the creditor on a collateral security held by him to secure the payment of the original debt.⁴

When a pledgee, with a view to foreclose the pledgor's interest in the

4 Mackey, 577; Chouteau v. Allen, 70 Mo. 290. The case of Roberts v. Sykes, above cited, was decided at special term and is not in harmony with the current of authority. It fails to distinguish between the right of the pledgor to pay the debt secured and receive the property pledged, and the right of action to redeem flowing from the tender of payment and a refusal by the pledgee to restore the property. The pledgor has the right under his contract to receive back his property on payment of the debt. The pledgee has the right under the same contract to retain the property until payment. Neither party has a right of action against the other until there has been a breach or repudiation of the contract. The pledgee cannot bring his action to foreclose or proceed to sell the property pledged without calling upon the pledgor to redeem; and the pledgor cannot bring his action to redeem without tendering payment of the debt. The pledgee's right of action to foreclose accrues upon the refusal of the pledgor to redeem after demand; the pledgor's right of action to redeem accrues upon the refusal of the pledgee to accept payment and restore the property pledged, or upon the doing of some act by the pledgee equivalent to a repudiation of the contract and a denial of the pledgor's rights under it.

¹ Slaymaker v. Wilson, 1 Penn. R. 216, per Chief-Justice GIBSON; and see Clark v. Bull, 2 Root R. 329.

² Wash v. Whitcomb, 2 Esp. R. 565; Bromley v. Holland, 7 Ves. 28; Hunt v. Rousmanier, 8 Wheat. R. 174.

³ The authority to sell the pledge is not affected by the statute. See Pratt v. Huggins, 29 Barb. 277; Thayer v. Mann, 19 Pick. 535; Bush v. Cooper, 4 Cush. 599; Baldwin v. Norton, 2 Conn. 163; Hulbert v. Clark, 128 N. Y. 295; Coldcleugh v. Johnson, 34 Ark. 312; Hancock v. Franklin Ins. Co., 114 Mass. 155; Shaw v. Silloway, 145 Mass. 503; Ballou v. Taylor, 14 R. I. 277.

⁴ Picket v. Leonard, 34 N. Y. 175; Harper v. Fairley, 53 N. Y. 442; 54 N. Y. 114.

pledge, proceeds to sell the same and becomes himself the purchaser, the transaction works no change in the rights of the parties. And so where a debtor, being pressed to pay his debt, assigns to his creditor a bond and mortgage made by a third party as a collateral security; and the creditor afterward forecloses the mortgage without making the debtor a party to the suit or proceeding, and himself buys in the property; the transaction does not cut off the debtor's right to redeem. The assignment of a subsisting mortgage as a collateral to secure a debt operates like a mortgage or a pledge;¹ and the debtor cannot be deprived of his interest in the property covered by the mortgage, or in the proceeds of it, without his consent;² or without being heard in the action;³ the purpose of the assignment must be carried into effect, and the avails of the security must be duly accounted for.⁴

¹ *Slee v. Manhattan Co.*, 1 Paige Ch. 48, 80; *Carr v. Carr*, 52 N. Y. 251.

² *Hoyt v. Martense*, 16 N. Y. 231; ante, § 292.

³ *Bloomer v. Sturges*, 58 N. Y. 168.

⁴ *Stoddard v. Whiting*, 46 N. Y. 627.

CHAPTER VI.

BAILMENTS FOR HIRE.

§ 325. Bailments for hire embrace a great variety of contracts connected with and growing out of the delivery of personal property, on an agreement mutually beneficial to the contracting parties. Letting for hire, or, as the phrase is commonly used, letting to hire, is a bailment where compensation is given for the use of a thing, or for labor and services about it or upon it. The contract embraces the hire of storage, the hire of things, the hire of labor and services, and the hire of carriage or transportation.¹ Warehousemen receive goods on deposit for a compensation paid for their custody or storage. One who hires a thing for use acquires a right to the possession and use for the term agreed upon; and the letter to hire gains an absolute property in the hire or compensation. Where cloth is delivered to a tailor to be made up into a suit of clothes, or a gem to a jeweler to be set or engraved, or timber to a mechanic to be converted into some useful implement; the tailor, jeweler and mechanic are bailees for labor and services, to be bestowed on the things entrusted to them, for a compensation.² The hire of carriage is a contract under which the carrier, by land or water, engages for the transportation and delivery of goods and merchandise—a bailment of great importance and daily use, and therefore to be treated by itself.

§ 326. Our law of bailment has, to a considerable degree, grown out of the civil code; and many of the principles now established in the common law have their root and foundation in the laws of Rome; but with us, as in earlier times, the vital element of every law is that natural equity which inspires and gives to it an authority over the human mind. We do not accept it as rendering a compliment to an early age or to the masterly genius of a great people; it is its own authority, witnessed by the consent of people widely separated from each other in lineage and language, but loyal to the same unchanging law of justice.

¹ 2 Kent's Comm. 586; Cowen's Trea. 66; Jones on Bailm. 85, 86, 90, 97.

² Pierce v. Schenck, 3 Hill, 29; Gregory v. Stryker, 2 Denio, 628.

Without being of any practical importance, it is gratifying to be able to trace a principle of law to its source ; to find, for example (that the rule which requires of one who hires a chattel for use the same degree of diligence that all prudent men, that is, the generality of mankind, use in keeping their own goods, is older than any existing legislative power.) For some reason, we place entire confidence in a law that has the sanction of the concurrent wisdom of nations in all ages ; and which, like a proverb freighted with a rich and just thought, passes from mind to mind with an inherent vitality that makes it a part of the currency of the world. We perceive in it a universal law ; that kind of universality which is implied in the pregnant maxim, that the voice of the people is the voice of God.

§ 327. Where one person deposits or leaves his goods with another, and pays a consideration for the custody of them, the contract is mutually beneficial to the parties, and the bailee must keep the goods with ordinary care.¹ He is required to exercise a degree of diligence greater than that which is demanded of the depositary without reward ; and he is excused for a degree less than that which is exacted of the borrower. The fact that he receives the goods within the line of his business for hire binds him to a diligence increased beyond that of a mere depositary ; and the fact that he renders a service to the owner of the goods, in keeping and guarding them, brings him under a less stringent obligation than that which rests upon one who borrows the use of a chattel, without rendering any sort of recompense for it.²

When it is said that the bailee for hire is responsible for the exercise of ordinary diligence, the meaning is, that he is bound to take that care of the goods entrusted to him which every person of common prudence, and capable of governing a family, takes of his own concerns : in other words, he is bound for that measure of diligence which prudent men of business commonly take of their own affairs.³ The rule has reference to the accustomed diligence of business men ; and the word *ordinary* is used to denote that which is customary among prudent men engaged in the business. The rule therefore prescribes the diligence of experts as the standard of attention and watchfulness ; using the term *experts* as

¹ Stewart v. Stone, 127 N. Y. 500.

² Spooner v. Mattoon, 40 Vt. 300; Smith v. First National Bank, 99 Mass. 500; Lancaster Bank v. Smith, 62 Penn. St. 47; Schmidt v. Blood, 9 Wend. 268.

³ Doerman v. Jenkins, 2 Adolph. & Ellis, 256; New York Central R. v. Lockwood, 17 Wallace, 357; Goodale v. Worcester Ag. Soc., 102 Mass. 401; Gray v. Harris, 107 Mass. 492; Gibbs v. Coykendall, 39 Hun, 140. There are many shades of care, from the merest glance of attention to the most vigilant anxiety and solicitude; and the law endeavors to fix a rule, between the two extremes, just in its application, and graduated so as to meet the needs and circumstances of business.

descriptive of persons having actual knowledge of the business, derived from experience.¹

The application of the common law rule, requiring ordinary care and diligence, depends so much upon circumstances that nearly every case gives occasion for some new illustration of the rule. In its affirmative form, the rule keeps its place with the strength of the reason on which it rests; while in its negative form, involving the comprehensive subject of negligence, it is daily receiving specific applications and branching out into a multitude of rules, defining what shall be considered neglect or omission of duty under given circumstances.²

§ 328. HIRE OF CUSTODY.

A delivery of property, to be stored or kept for hire, creates a contract of bailment and obliges the bailee to the use of ordinary care; or that degree of care called for by the circumstances. The contract is to be fulfilled according to its terms;³ and the custody of the property must be transferred to the bailee in order to charge him with its safe keeping. A party receiving horses to be fed and taken care of, as in a livery-stable, must observe his instructions and take reasonable care of them; and in the performance of his engagement he is liable for the acts and omissions of his agents and servants. He is not liable for the omissions or negligence of a servant, sent by the owner to feed and take care of them.⁴ His duties are such as grow out of the special contract;⁵ and he is liable as a bailee for horses received to stable and feed in that capacity⁶

¹ In certain lines of business the use of this term becomes natural, and will be found convenient; in others it fails to serve any important purpose. As generally used in the profession, the term *expert* means a witness qualified by his vocation, or special education in some business or science, to give an opinion; and the sense of the term may be limited, so as to describe a person with reference to his experience or special knowledge. *De Witt v. Barly*, 17 N. Y. 340; *Clark v. Baird*, 9 N. Y. 183; *Robertson v. Knapp*, 35 N. Y. 91. See *Wharton on Negligence*, Chap. 2, and § 500.

² The recent works on the subject of negligence, in England and in this country, indicate the growing importance of the theme, and the steady expansion of the law in this direction. Would it not be a better plan to discuss the law on the theory of affirmative obligation?

³ *Collins v. Bennett*, 46 N. Y. 490.

⁴ *Stone v. The Western Tr. Co.*, 38 N. Y. 240; *Berry v. Morix*, 16 La. Ann. 248. If a stable-keeper, through his watchman, permits drunken men with pipes and matches to make a lodging-house of the hay-loft, and the stable is burned and a horse he is boarding is lost, he may be held liable for the loss. *Eaton v. Lancaster*, 79 Me. 477. But the stable-keeper is not an insurer of animals left with him. To render him liable for a loss or injury to such animals it must appear that he is chargeable with negligence resulting in the loss or injury. *Dennis v. Huyck*, 48 Mich. 620.

⁵ *Williams v. Jones*, 3 Hurl. & Colt, 256, 602.

⁶ *Swann v. Brown*, 6 Jones (N. C.) L. 150.

—liable to the owner on whose account he received the property.¹

§ 329. One who takes horses or cattle to pasture for a compensation holds them as a bailee, in very nearly the same capacity as the keeper of a livery-stable holds the horses left him to be kept for hire. He is a bailee, bound for the exercise of ordinary care under the circumstances.² He holds under an implied contract to return the cattle to the owner on demand; and where he fails to return them, the burden of proof is on him to excuse his failure; and this he may do by showing that he has used the diligence required by his contract.³ As bailee he has a special or qualified property in the chattels, together with the possession; he is responsible for them; he may therefore vindicate his possessory interest by an action against any stranger or third person, and he may recover in his action the full value of the property.⁴ The owner may also bring an action for the recovery of the property, but not both of them;⁵ in order to recover, the plaintiff must show a present right of possession in the chattels.⁶

§ 330. Receiving property to keep for hire, the bailee impliedly engages to preserve it with due care and reasonable skill; and this engagement obliges him, in an unforeseen emergency, to act with discretion and good sense in his treatment of the property. If the cattle or horses fall sick, it will become his duty to employ the usual means for their safety; by calling in a farrier.⁷ And as the original contract

¹ *Randall v. Doane*, 9 Gray (Mass.), 408. The owner for whose account the horse was received is liable for the keep.

² *Umlauf v. Bassett*, 38 Ill. 96; *Hally v. Markel*, 44 Ill. 225; *McCarthy v. Wolfe*, 40 Mo. 520; *Eastman v. Patterson*, 38 Vt. 146; *Smith v. Cook*, L. R. Q. B. D. 79, where a horse was gored by a bull. He is bound to furnish a pasture secure against the ordinary accidents incident to the cattle to be pastured. The field must be properly fenced and be free from dangerous places and obstacles. A failure in these respects will render him liable for damages occasioned thereby. But he is not an insurer of the property, and unless he is guilty of negligence he is not liable for injuries that may be suffered from other causes, over which he has no control. He is bound to use ordinary care; that care which an ordinary prudent person would exercise over his own property of like character. *Gibbs v. Coykendall*, 39 Hun, 140; and see *Waldo v. Beckwith*, 1 New Mexico, 97.

³ *Goodfellow v. Meegan*, 32 Mo. 280. See *Rey v. Tonney*, 24 Mo. 600.

⁴ *Kissam v. Roberts*, 6 Bosw. 154; *Alt v. Weidenberg*, 6 Bosw. 176; *Hendricks v. Decker*, 35 Barb. 298; *Duncan v. Spear*, 11 Wend. 54; 56 Barb. 661; *Root v. Wilson*, 1 Barn. & Ald. 59; 6 East, 519.

⁵ *Green v. Clarke*, 12 N. Y. 343. See *Spear v. Blackman*, 9 Wend. 167.

⁶ *Bush v. Lyon*, 9 Cowen, 52; 25 N. Y. 348.

⁷ *Dean v. Keete*, 3 Campb. R. 4; *Redding v. Hall*, 1 Bibb. R. 536; *Harrington v. Snyder*, 3 Barb. 380; and see *Edwards v. Carr*, 13 Gray, 234. He must see that

did not provide for this unexpected expense, the owner is liable for it.¹

§ 331. The bailee receiving cattle or horses to stable or pasture for

proper treatment is furnished or immediately notify the owner. *Hexamer v. Southal*, 40 N. J. L. 682.

¹ See the following opinion:

SUPREME COURT.

PHILIP HARTER *v.* JOSHUA I. BLANCHARD.

FOURTH DEPARTMENT. Present, MULLEN, P. J., TALCOTT and E. D. SMITH, Justices.

By the Court.—E. DARWIN SMITH, J.

This action is brought to recover for the keeping and care bestowed by the plaintiff upon the defendant's horse. From the report of the referee and the evidence advanced before him, it appears that the defendant, being a resident of Saratoga and the owner of said horse, in the fall of 1870 entrusted the same to one William P. Tanner, residing at Frankfort, in Herkimer County, to be kept at pasture without any charge to be made therefor. That said Tanner kept said horse on his farm, and occasionally rode him, and took him to exhibit him at the Herkimer County Agricultural Fair, in November of that year, on which occasion he took him to the village of Herkimer and placed him in the hotel barn of one Tower, where he remained during the day and was left in the evening, tied with a halter, in a stall in said barn.

That on the next morning the said horse was found in the stall where he had been left the previous evening with one of his fore legs broken. That thereupon the plaintiff was sent for by said Tanner and employed by him to take care of said horse and attempt to cure him; and it was arranged between the plaintiff and said Tanner that the said horse should be removed to the plaintiff's barn, and that he should take charge of him at that place, and he did so. This action was brought for such service by plaintiff, which the referee finds was reasonably worth \$1 per week; for which sum, with some deductions for the use of said horse by the plaintiff, judgment was directed by said referee.

From these facts it appears that the said Tanner was the naked bailee of said horse, without reward or consideration. As said bailee he was bound to exercise ordinary care, and was responsible only for gross negligence. (Story on Bailments, §§ 61, 62, 65, and 66.) When the horse broke his leg, the owner, the defendant, being at a distance, the said Tanner was doubtless bound, in the exercise of ordinary care, to provide for his keeping, care and cure, as he would if the horse had been his own, and would have been guilty of gross neglect if he had omitted to make such provision.

His contract with the plaintiff was a proper and reasonable one under the circumstances. This is not questioned.

The plaintiff, as I gather from the evidence, was a farrier, and was a fit and proper person and had proper accommodation for the charge of said horse. As a bailee in possession of said horse, the said Tanner had an implied authority to contract in behalf of the defendant for such care and keeping of said horse. He could no longer be pastured, and an exigency had arisen to preserve his life and restore if possible his broken leg, which made necessary such an arrangement as the said Tanner made with plaintiff, and I have no doubt he had full authority to bind the defendant by the contract then made until at least the defendant could be informed of the accident to his horse, and could have time and opportunity to make other provision for his custody, care and keeping. The defendant, it appears, was soon apprised of the accident to

hire does not under the common law acquire any lien upon them for their keeping.¹ There must be a special contract to create such a lien; and it is held that a lien by an agreement of the parties will not deprive the owner of his right to bring an action of trespass against a third party interfering with the property.² The common law gives some bailees a lien on grounds of public convenience, and for the benefit of trade; a lien to those who are obliged to accept the custody of goods and chattels, and to those who are engaged in some particular branch of trade or commerce, and to those who by their skill and labor impart to the goods some new or additional value.³ The manner in which cattle are received to pasture, and in which horses are kept or boarded in a livery-stable for the owner, often precludes that kind of possession which is essential to maintain a lien.⁴

A distinction is taken between the mere keeper and a trainer of horses, on the ground that the latter improves the chattels by the application

the horse, and that the same was in the possession of the plaintiff, for care and keeping, and did not disaffirm such contract or make other proposition for the charge and custody of said horse. It springs from the very nature of bailor and bailee, that the latter necessarily has authority to contract for and bind the bailor in such cases for the preservation and care of the property in his possession, and particularly with live animals injured, as in this case; as much so as the master of a vessel has power to bind the owner for repairs arising from injury or casualty at sea. Contracts so made are clearly binding upon the principal or bailee. (Story on Bailments, §§ 198, 199; and 1 Pothier, 167.) And this is so, even though the bailee may also be liable for such care upon a particular contract.

It seems to me quite clear that the defendant was primarily liable for the care and keeping of the horse upon the facts found by the referee upon the original contract, and that he should be held liable as upon an affirmation of Tanner's contract, when he learned of it and did not disapprove it by notice to the plaintiff, directly and distinctly reclaim his horse, or make other provision for its care. And that the plaintiff's rights in this connection are not affected by the relation between Tanner and the defendant, nor by the consideration whether Tanner was guilty of such negligence in the use or abuse of the horse as to be responsible to the defendant for the injury sustained by him. The plaintiff had nothing to do with that question.

The decision of the referee upon the whole issue I think was right, and the judgment should be affirmed.

See *Notara v. Henderson*, L. R. 7 Q. B. 225.

¹ *Grinnell v. Cook*, 3 Hill, 485, 491; *Bissell v. Pearce*, 28 N. Y. 252, 255; *Goodrich v. Willard*, 7 Gray, 183; *Fox v. McGregor*, 11 Barb. 41.

² *Neff v. Thompson*, 8 Barb. 213.

³ *Morgan v. Congdon*, 4 N. Y. 552.

⁴ When horses are kept at livery, the owner takes and uses them at pleasure, and the bailee only has a lien so long as he retains the uninterrupted possession. Per *BRONSON, J.*, in *Grinnell v. Cook*, 3 Hill, 492. See also in regard to milch cows, where the owner has occasional possession, *Jackson v. Cummins*, 5 Mees. & Wels. 342; *Fox v. McGregor*, 11 Barb. 41.

of his labor and skill, and should have a lien based on that service.¹ And it is agreed that a farrier has a lien upon horses for his services in their keeping and treatment; ² and that a blacksmith has a lien for shoeing them.³

Under the statute law of this State, livery-stable keepers and other persons keeping horses at livery or at pasture, or boarding the same for hire, under an agreement with the owner, may, on due notice of their charges and intention, detain the property until their reasonable charges are paid. And they may enforce their lien in any court having jurisdiction of the amount; by a suit ascertaining the amount due, and obtaining a decree of sale and foreclosure.⁴

§ 332. WAREHOUSEMEN.

Bailees of this class carry on a business of a public nature; they receive goods generally, that is, from all persons indifferently, for storage.⁵ They invite business, and impliedly license the public to enter upon their premises; the business is also of a private nature, and the license may be revoked or qualified.⁶ Bailees receiving goods in store, but not engaged in the business, are not clothed with all the rights which the law confers upon a warehouseman; ⁷ and their business is not covered by the statutes relating to warehouse receipts.⁸

The State has the right to regulate the conduct of its citizens towards each other, and the mode of transacting business affecting public interests. It has the right to make regulations affecting the use and management and charges of elevators and warehouses and railroads; and these regulations are valid, even where they incidentally affect inter-state commerce.⁹

¹ Judson v. Etheridge, 1 Crompt. & Mees. 743; 3 Hill, 492; Bevan v. Waters, 3 Carr. & P. 520; 12 J. Scott, N. S. 638; Forth v. Simpson, 13 Q. B. 380.

² Lord v. Jones, 11 Shep. 439; Lane v. Cotton, 1 Ld. Raym. 654.

³ Cummings v. Harris, 3 Vt. 245. The stabler has a lien upon a mare left at his stable to be covered by a stallion. Scarfe v. Morgan, 4 Mees. & W. 270. As to the statutory lien of the owner of a stallion upon the mare and foal, see Laws of 1887, Chap. 458, as amended by Laws of 1888, Chap. 457.

⁴ 3 R. S. of N. Y. 817, 6th ed.; Laws of 1872, Chap. 498; Laws of 1880, Chap. 145; Laws of 1892, Chap. 91.

⁵ Platt v. Hibbard, 7 Cowen, 497, 500.

⁶ Bogert v. Haight, 20 Barb. 251; Heaney v. Heaney, 2 Denio, 625; Beardsley v. French, 7 Conn. 125.

⁷ Alt v. Weidenburg, 6 Bosw. 176; Rivara v. Ghio, 3 E. D. Smith, 264; 1 Hilton, 292.

⁸ Yenni v. McNamee, 45 N. Y. 614; Farmers & Mechanics' Nat. Bank v. Lang, 87 N. Y. 269. See Edwards on Factors and Brokers, §§ 55, 58-65.

⁹ Munn v. Illinois, 4 Otto, 113. See Delaware, etc., R. R. Co. v. Central Stockyard, etc., Co., 45 N. J. Eq. 50.

§ 333. A warehouseman or depositary of goods for hire is bound for the exercise of ordinary diligence, or that care which prudent persons usually take of their own property.¹ He is not like a common carrier, liable as an insurer of the goods; he is not liable for losses or injuries, where he uses all the care and diligence in relation to the property which prudent men exercise in relation to their own.² Using due diligence, he is not responsible for goods stolen or embezzled by his storekeeper or servant, or for losses caused by fire, or by accident;³ and he is liable for the goods where they are lost or stolen through his negligence or want of due care.⁴

When a compensation is to be paid for house-room and not as a reward for care and diligence, the bailee's liability is not exactly that of a warehouseman; he is bound only for the use of reasonable diligence under the circumstances;⁵ as where the owner of goods is permitted to place them in a storeroom or outbuilding which is not specially protected or guarded against thieves or accidental losses.⁶ The bailee's engagement is such as the transaction fairly implies.

§ 334. A warehouseman who is also a wharfinger or forwarding merchant assumes the double responsibility of storing and forwarding the goods entrusted to him; and is responsible for ordinary care, skill and diligence in the discharge of the duties incident to the business.⁷ Receiving or coming into possession of the goods as a forwarder, at a given point, he is like other agents bound by the directions of his principal; he must send them forward according to his instructions, or by the usual conveyance, where his instructions fail or become impracticable.⁸

¹ *Arent v. Squire*, 1 Daly, 347, 350, and cases there cited; *Jones v. Morgan*, 90 N. Y. 4; *Titsworth v. Winnegar*, 51 Barb. 148.

² *Knapp v. Curtis*, 9 Wend. 60; *Platt v. Hibbard*, 7 Cowen, 497.

³ *Schmidt v. Blood*, 9 Wend. 268; 33 Barb. 241; *Garside v. Trent Nav. Co.*, 4 T. R. 581; *Cailiff v. Danvers*, 1 Peake N. P. 114; *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548; *Willett v. Rich*, 142 Mass. 356; *Rice v. Nixon*, 97 Ind. 97; *Battenberg v. Nixon*, 97 Ind. 106; *Claffin v. Meyer*, 75 N. Y. 260. The warehouseman may render himself liable for loss by fire by warranting his warehouse to be fireproof. *Hickey v. Morrell*, 102 N. Y. 454.

⁴ *Halyard v. Dechelman*, 29 Miss. 8; *Jones*, 459; *Petty v. Overall*, 42 Ala. 145; *Lamb v. Camden & Amboy R. R. Co.*, 46 N. Y. 271, 278.

⁵ *Finucane v. Small*, 1 Esp. N. P. R. 315; *Foote v. Storrs*, 2 Barb. 326. See circumstances disclosed in *Trust v. Pirsson*, 1 Hilton, 292; 8 Taunt. R. 443; *Jones v. Morgan*, 90 N. Y. 4.

⁶ *SUTHERLAND, J.*, in *Schmidt v. Blood*, 9 Wend. 271.

⁷ *Bush v. Miller*, 13 Barb. 481; *Gilbert v. Dole*, 5 Ad. & Ellis, 540; *White v. Humphrey*, 11 Q. B. 43.

⁸ *Johnson v. N. Y. Central R. Co.*, 31 Barb. 196; S. C. 33 N. Y. 610; *Ackley v. Kellogg*, 8 Cowen, 223.

His instructions being given in general terms, he must follow them in good faith, interpreting them by the established usage and course of business.¹ He must not deviate from his instructions, for his own convenience; and even in an emergency, he is not at liberty to go contrary to his instructions, where he can safely wait for further orders.² If the contract specify the manner in which the goods are to be sent forward, the carrier may safely go by its terms.³

§ 335. A forwarder, a person who receives and forwards goods, taking upon himself all the expenses of the transportation, is not a common carrier where he has no interest in the boats or conveyance by which they are carried. By his contract he undertakes to forward the goods, he does not undertake to carry and deliver them.⁴ The contract determines the capacity in which he receives the property. If he receives it under a contract, express or implied, to carry and deliver, he is held to the liability of a carrier.⁵ His want of interest in the conveyance by which the goods are to be transported is not the test of his liability: our express companies conduct an extensive carrying business, without having any proprietary interest in the cars, roads and lines employed by them in the work of transportation. At the outset, they claimed to act as forwarders, under a limited liability;⁶ on a mature consideration, it is now agreed that they act in the capacity of common carriers.⁷ And where a party undertakes the business of a carrier, and makes contracts in the prosecution of it, he is not permitted to escape responsibility; the receivers or trustees of a railroad company acting as common carriers are held liable in that capacity.⁸

§ 336. Where a party unites the business of a common carrier with that of a warehouseman, and receives goods into his warehouse, to be carried forward on the owner's subsequent order, the contract is one of ordinary bailment; and the bailee is liable for the goods as a warehouseman until they are ordered forward. But where the deposit in the

¹ *Van Santvoord v. St. John*, 6 Hill, 157. The address on the goods was regarded as a general direction. See *Brown v. Dennison*, 2 Wend. 593.

² *Johnson v. N. Y. Central R. Co.*, 33 N. Y. 610; *Forsyth v. Walker*, 9 Barr. 148.

³ *Hinckley v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 429.

⁴ *Roberts v. Turner*, 12 John. R. 232.

⁵ *Teall v. Sears*, 9 Barb. 317; *Simmons v. Law*, 8 Bosw. 213; S. C., 3 Keyes, 217.

⁶ *Hirshfield v. Adams*, 19 Barb. 577.

⁷ *Place v. Union Ex. Co.*, 2 Hilton, 19; *Buckland v. Adams Ex. Co.*, 97 Mass. 124; *Sweet v. Barney*, 23 N. Y. 335; *Belger v. Dinsmore*, 51 N. Y. 166; *American Union Express Co. v. Robinson*, 72 Pa. St. 274.

⁸ *Rogers v. Wheeler*, 43 N. Y. 598; *Ballou v. Farnum*, 9 Allen, 47; *Sprague v. Smith*, 29 Vt. 421; *Paige v. Smith*, 99 Mass. 396; *Blumenthal v. Brainard*, 38 Vt. 408; *Morse v. Brainard*, 41 Vt. 111.

warehouse is a mere accessory to the carriage, or where the goods are deposited for the purpose of being carried without further orders, the responsibility of the bailee begins as that of a carrier from the time the goods are received.¹

After the goods arrive at their place of destination, and the consignee is notified of their arrival and has had a reasonable time to receive them, the carrier's character changes to that of a warehouseman; and after that he is only liable as a bailee for hire.² The same rule applies where the carrier makes due inquiry and fails to find the consignee, and thereupon stores the property.³ He is not regarded as a gratuitous bailee, though he receives nothing definitely charged for the storage, at the commencement or at the close of the transaction. The incidental facilitates or contributes to the principal business; the storage of the goods is not therefore a gratuitous service. It is a duty which springs out of the principal contract, where the goods are left in the carrier's hands temporarily for the owner's convenience; an event which occurs so frequently that the parties are supposed to have contemplated the contingency.⁴

§ 337. When the consignee is unable or refuses to receive the goods within a reasonable time, the carrier is at liberty to deposit them with a responsible warehouseman.⁵ And where he does so under these circumstances, the storehouse-keeper becomes a bailee of the property and

¹ Blossom v. Griffin, 13 N. Y. 569; Ladue v. Griffith, 25 N. Y. 364; Read v. Spaulding, 39 N. Y. 630; 47 Barb. 152; Barren v. Eldridge, 100 Mass. 455; Rogers v. Wheeler, 52 N. Y. 262; S. C. 6 Lansing, 420; McDonald v. Western R. R. Co., 34 N. Y. 497; Coyle v. Western R. R. Co., 47 Barb. 152.

² Fenner v. Buffalo & State L. R. Co., 44 N. Y. 505; Cook v. Erie Railway Co., 58 Barb. 312; Draper v. Prest, etc., D. & H. C. Co. 118 N. Y. 118; Weed v. Barney, 45 N. Y. 344; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170.

³ Pelton v. Rensselaer & Saratoga R. Co., 54 N. Y. 214; Witbeck v. Holland, 45 N. Y. 13.

⁴ Matter of Webb and others, 8 Taunt. R. 443; White v. Humphrey, 11 Adolph. & Ellis, 43; Burnell v. N. Y. Central R. Co., 45 N. Y. 184; N. Plains Co. v. Boston & Maine R. R. Co., 1 Gray, 263; Cay v. Cleveland & T. R. R. Co., 29 Barb. 35.

⁵ Redmond v. Liverpool, N. Y. & Phila. S. Co., 46 N. Y. 578; Ostrander v. Brown, 15 John. R. 39; Price v. Powell, 3 N. Y. 322; Richardson v. Goddard, 23 How. U. S. 28; Western Tr. Co. v. Barber, 56 N. Y. 544; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170, 182; Scheu v. Benedict, 116 N. Y. 510. The carrier is not at liberty to abandon the goods or negligently expose them to injury even if the consignor neglects to receive or to receipt for them after notice of their arrival. So long as he has the custody of the goods, although there has been a constructive delivery which exempts him from liability as a carrier, there supervenes upon the original contract of carriage by implication of law a duty as bailee or warehouseman to take ordinary care of the property. Scheu v. Benedict, 116 N. Y. 510; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170.

liable for it to the owner.¹ The necessities of business authorize the transaction; and it is not considered the carrier's legal duty to notify the consignor of the action taken by him. The duty of diligence in this particular rests properly with the owner of the goods.² The carrier is not at liberty to return or carry back the goods.³

The carrier is not obliged to store the goods at the place of destination with another party, in order to reduce his liability to that of a warehouseman.⁴ He makes a new contract by consenting to hold the goods after having tendered a delivery of them, for the accommodation of the consignee; and his agreement to retain or to store them for a time binds him to the responsibility of a bailee for hire.⁵ By simply retaining the goods at the owner's request, after notice of his readiness to deliver, the carrier by implication ceases to be liable as an insurer of the goods;⁶ he can hardly be held liable as a carrier where by reason of the consignee's neglect he is entitled by the contract implied by law to recover demurrage for the wrongful detention of his vessel;⁷ nor where the consignee, being obliged to come and remove the goods, does not do so within a reasonable time.⁸

§ 338. Custom often indicates the carrier's duty in delivering the goods; and the course of business may often be shown, in order to interpret his contract. And both the custom and course of business may be proved, with the circumstances to establish the carrier's liability as a warehouseman, after the goods have been landed on the wharf.⁹ Steamboats running regular trips must land their freight without delay; and where that is the custom, the delivery is completed by land-

¹ *Fisk v. Newton*, 1 Denio, 45; *Williams v. Holland*, 22 How. Pr. 137.

² *Hudson v. Baxendale*, 2 Hurl. & Norm. 577; *Williams v. Holland*, 22 How. Pr. 137; *Railey v. Porter*, 32 Mo. 471. The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 180.

³ *Crouch v. Great Western R. Co.*, 2 Hurl. & Nor. 491; S. C. 3 id. 183.

⁴ *Fenner v. Buffalo & State Line R. Co.*, 44 N. Y. 505.

⁵ *Hathorn v. Ely*, 28 N. Y. 78.

⁶ *Labar v. Taber*, 35 Barb. 305; *Thomas v. Boston & Providence R. R. Corp.*, 10 Met. 472; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 180. As to baggage left at depot, see 45 N. Y. 184; 34 N. Y. 548; 49 N. Y. 546; 57 N. Y. 552.

⁷ *Clendaniel v. Tuckerman*, 17 Barb. 184; *Cross v. Beard*, 26 N. Y. 85.

⁸ *Thomas v. Boston & Prov. R. Co.*, 10 Metc. 477; *McCarty v. New York & Erie R. R. Co.*, 30 Pa. St. 247; *Illinois Central R. R. Co. v. Alexander*, 20 Ill. 23; *Richards v. Michigan, etc., R. R. Co.*, 20 Ill. 104; *Porter v. Chicago & R. I. R. R. Co.*, 20 Ill. 407; *Davis v. Michigan, etc., R. R. Co.*, 20 Ill. 412; *Bansemer v. Toledo, etc., R. R. Co.*, 25 Ind. 434; *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548.

⁹ *Gibson v. Culver*, 17 Wend. 305, and cases there cited by COWEN, J.; *The J. Russell Manuf. Co. v. N. H. Steamboat Co.*, 50 N. Y. 121.

ing the goods on the wharf, after the consignee has had a reasonable time to remove the goods. And it is agreed that the course of business between the parties may control the mode of delivery.¹ In the absence of any such course of business or local usage, the delivery must be reasonable in time and place; the carrier must not leave the goods unprotected on the wharf; it is his duty to take care of them for the owner. He should notify the owner of his readiness to deliver; and ordinarily should place the goods within the owner's custody.² On the other hand, it is the duty of the owner or consignee to accept and remove the goods within a reasonable time; and where there is no dispute about the facts, it is for the court to determine what is reasonable time, as a question of law.³ The delivery is complete where bulky articles are landed from a vessel on a public wharf, and the consignee who is the owner pays the freight and takes steps toward removing them: the delivery is complete as soon as the owner has had a reasonable opportunity to remove the goods.⁴

§ 339. When goods are to be carried over successive lines, it is the duty of each carrier to deliver to the next;⁵ and it is the policy of the law to prevent the goods from falling into the hands of a warehouseman between the connecting lines. The intermediate carrier does not become a warehouseman, by carrying the goods to the end of his route and depositing them there in his own warehouse, or in a place of temporary storage to facilitate a transfer of the goods.⁶ He holds as carrier until he delivers the goods; certainly the law does not permit him, at his own option, to store the goods and thereby escape his proper responsibility.⁷ A refusal by the next carrier to receive the goods will

¹ *Ely v. N. H. Steamboat Co.*, 51 Barb. 207; 6 Abbott Pr. N. S. 72; 50 N. Y. 121; *Western Tr. Co. v. Hawley*, 1 Daly, 327; 2 Hilton, 150; *Farmers & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186, 209; *Noyes v. Rut. & Bur. Railway*, 27 Vt. 110; *Kilroy v. Delaware & Hudson Canal Co.*, 121 N. Y. 22.

² *Redmond v. Liverpool, N. Y. & Phila. S. Co.*, 46 N. Y. 578; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 179; *Scheu v. Benedict*, 116 N. Y. 510.

³ *Hedges v. Hudson River R. R. Co.*, 49 N. Y. 223; *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548; *Dinunny v. N. Y. & N. H. R. R. Co.*, 49 N. Y. 546; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 180.

⁴ *Goodwin v. Baltimore & Ohio R. Co.*, 50 N. Y. 154.

⁵ *Rawson v. Holland*, 59 N. Y. 611; *Jennings v. Grand T. Ry. Co.*, 127 N. Y. 438; *Alabama, etc., R. R. Co. v. Thomas*, 83 Ala. 343. The carrier may contract to transport the goods to a point beyond his line. *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 296; *Falvey v. Georgia R. R. Co.*, 76 Ga. 597.

⁶ *Goold v. Chapin*, 20 N. Y. 259; *McDonald v. Western R. Co.*, 34 N. Y. 497; *Miller v. Steam Nav. Co.*, 10 N. Y. 431.

⁷ *Ladue v. Griffith*, 25 N. Y. 364.

doubtless justify him in taking the proper steps renouncing any further liability as a carrier.¹ But so long as he retains the goods, waiting upon the action of the next carrier, his character remains unchanged. The contract of each is to carry and deliver to the next carrier; his duty as a carrier is not therefore fulfilled until the delivery is made; and it is considered sound public policy that a strict responsibility should cover the goods until they reach their destination.²

The manner in which a carrier uniformly delivers goods to the succeeding carrier, as by placing them upon an adjacent platform, indicates the duty of each in the transaction.³

§ 340. There may be special cases where the carrier receives goods to be carried to the end of his route, and then forwarded by the first opportunity to another point; where the contract is double, and the goods have to be stored to await the opportunity to send them forward. Thus, where common carriers undertook to carry goods from Stourport to Manchester, and to forward them from thence to Stockport, and carried them according to agreement safe to Manchester, and there deposited them in a warehouse of their own, where they were destroyed by fire before an opportunity occurred to forward them, Lord Kenyon held that the liability of the carriers, as such, ceased when the goods were put into the warehouse; and that in the capacity of warehousemen, they were not responsible for an injury arising from no want of diligence on their part.⁴ In cases of this kind, where the carrier makes a distinct contract to forward the goods from the end of his route, and the circumstances imply an undertaking on his part to store the goods until they can be sent forward, or where they reach a place of deposit where they are to remain till ordered forward, there is no reason for a departure from the early rule. But where the carrier stores them for his own convenience at any point along the route, or at its termination, preparatory to a delivery, he is liable as a carrier, and not as a warehouseman.⁵

¹ *Mills v. Michigan Central R. R. Co.*, 45 N. Y. 622; *Plantation No. 40 v. Hall*, 61 Maine, 517; *Rawson v. Holland*, 59 N. Y. 611.

² *Railroad Co. v. Manufacturing Co.*, 16 Wallace, 318; *Corkey v. Milwaukee & St. P. R. R.*, 31 Wis. 619; *Irish v. Milwaukee & St. Paul R. R.*, 19 Minn. 376; *McDonald v. Western R. R. Co.*, 34 N. Y. 497; *Goold v. Chapin*, 20 N. Y. 259; *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505; *Ladue v. Griffith*, 25 N. Y. 364; *Nashua Lock Co. v. Railroad Co.*, 48 N. H. 339; *Barter v. Wheeler*, 49 N. H. 9.

³ *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166. The usage also controls the delivery to the consignee. *Farmers & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186, 209.

⁴ *Garside v. Proprietors of Trent & Mersey Nav. Co.*, 4 Term R. 581. See *Salinger v. Simmons*, 2 Lansing, 325; *S. C.* 57 Barb. 513; 8 Abb. Pr. N. S. 409.

⁵ *Forward v. Pittard*, 1 Term R. 27; *Hooper v. Wells, Fargo & Co.*, 27 Cal. R. 11;

§ 341. When a given mode of delivery becomes the established course of business between a carrier and a consignee, it affects them on the theory of a tacit understanding to follow the usage;¹ and that is the ground on which parties are bound by a uniform settled usage or custom of business. They are supposed to adopt it and carry on their business under it.² Hence, in some of our States, the carrier by rail becomes a warehouseman, where, on the arrival of goods at the depot or at way-stations along the line, it is the well-known and settled custom for him to store the goods, and for the consignee to come and take them, without notice.³

§ 342. It is sometimes difficult, and as important as it is difficult, to determine when the duties of a warehouseman begin, and from what time he is chargeable with the care and custody of the goods. Where he receives them from the carrier, his responsibility commences at the point where that of the carrier ends. If, by the custom of the place to which the goods are directed, the carrier delivers them to the consignee by depositing them in a warehouse, the delivery is not complete so as to discharge the carrier, until they are actually stored within the building.⁴ If a carrier on the canals, in unloading his boat at the termination of the voyage, uses the tackle or machinery of a warehouse in hoisting the goods from his boat, he makes the machinery his own for that purpose; and if it breaks so as to injure or destroy the goods, he is responsible for the loss. His undertaking includes the duty of delivering them in safety; and his responsibility continues until the act of delivery is completed.⁵

§ 343. When goods are carried to a warehouse for storage, the warehouseman is liable for the goods lost or injured, from the time his crane is applied to raise them into the warehouse; he is responsible for the strength and safety of the tackle and machinery used by him.⁶ The act of lowering from, as well as the hoisting of goods into the warehouse,

Hide v. Trent & Mersey Nav. Co., 5 Term R. 389; *Rogers v. Wheeler*, 6 Lansing, 420; *S. C.* 52 N. Y. 262; *Sultana v. Chapman*, 5 Wis. 454.

¹ *The J. Russell Manuf. Co. v. The N. H. Steamboat Co.*, 52 N. Y. 657.

² *Gibson v. Culver*, 17 Wend. 305; *Ely v. New Haven Steamboat Co.*, 53 Barb. 207.

³ *Norway Plains Co. v. Boston & Maine R. Co.*, 1 Gray, 263. See *Tanner v. Oil Creek Railw.*, 53 Penn. St. 411; *New Albany & Salem R. R. v. Campbell*, 12 Ind. 55; *Morris & Essex R. R. v. Ayres*, 5 Dutcher, 394; *Francis v. Dubuque R. R.*, 25 Iowa, 60; *Hillard v. Weldon R. R.*, 6 Jones (N. C.), 343; *Chicago & H. R. R. v. Scott*, 42 Ill. 132.

⁴ See *Salinger v. Simmons*, 2 Lansing, 325; 8 Abbott Pr. (N. S.) 409; 57 Barb. 513.

⁵ *De Mott v. Laraway*, 14 Wend. 225; *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Kilroy v. Delaware & Hudson Canal Co.*, 121 N. Y. 22.

⁶ *Thomas v. Day*, 4 Esp. R. 262.

is considered done under his direction. Accordingly, where a warehouseman at Liverpool employed a master porter to remove a barrel from his warehouse, and the master porter employed his own men and tackle, and through the negligence of the men the tackle failed, and the barrel fell upon and injured a passer-by, it was held that the warehouseman was liable in case for the injury.¹ The servant's negligence in the course of his business is attributed to his master; as where through his negligence the goods are not delivered when called for, and are afterwards destroyed by fire.² But the warehouseman is not responsible for the neglect of his servants to aid in preserving property from fire, when they are not on duty; as where they are casually present at a fire in the night-time.³

§ 344. The warehouseman's duty of diligence covers his entire business, including the construction and safety of his warehouse;⁴ the proper storing of the goods with respect to the strength of the floors;⁵ and the nature of the property;⁶ and all due and reasonable precautions against losses by theft, burglary and other perils.⁷ Let us take a case for illustration: A quantity of salt was delivered to a warehouseman at Buffalo, on the wharf in front of his warehouse, where he had it piled up in tiers; the wharf and store were built considerably higher than the water had ever been previously known to rise; the salt remained there some days, when the warehouseman was requested to put it in store, which it was agreed should be done unless it was soon sold; directly after, a gale upon the lake caused the water to rise so as to overflow the wharf and wet and destroy the salt contained in the lower tier of barrels; and in an action for the property destroyed, it was shown that the injury could not have been much less if the salt had been placed within the warehouse; and accordingly the charge of the circuit judge was held to be good law, that the warehouseman was liable only in consequence of neglect to use such care in the preservation of the salt

¹ *Randleson v. Murray*, 8 Adolph. & Ellis, 109. See as to the relation of master and servant, *Milligan v. Wedge*, 12 Adolph. & Ellis, 737; and *McMullen v. Hoyt*, 2 Daly, 271; and *Chapman v. N. Y. Central R. R. Co.*, 33 N. Y. 369; *Gibson v. Inglis*, 4 Campb. 72.

² *Stevens v. Boston & Maine R. Co.*, 1 Gray, 277.

³ *Aldrich v. Boston & Worcester Railroad Co.*, 100 Mass. 31.

⁴ *Waldon v. Finch*, 70 Penn. St. 461. Taking reasonable care in the erection of his warehouse, he is not liable for occult defects of which he had no means of knowledge. The law is more strict where a structure is erected to be let as a platform from which to observe the races. See *Francis v. Cockrell*, L. R. 5 Q. B. 184; R. S. of U. S. 636.

⁵ *Edwards v. Halinder*, Poph. 46.

⁶ *Cliff v. Danvers*, Peake N. P. C. 114.

⁷ *Schwerin v. McKie*, 5 Robt. 404, 421; S. C. 51 N. Y. 180.

as prudent men ordinarily take of their own property; that to justify a verdict against him, the jury must be satisfied that the injury complained of was occasioned by the neglect of the depositary, either in not raising his wharf to a sufficient height, in not rolling the salt into the storehouse, or in not securing it after the commencement of the storm; and that if they should be of the opinion that he ought to have rolled the salt into the storehouse before the storm, the plaintiff would be entitled to recover the difference between the injury which the salt received on the wharf and that which it would probably have received had it been rolled into the storehouse.¹

§ 345. Not to anticipate and provide against a flood greater than has ever been known is not negligence; it is not negligence in a common carrier.² The warehouseman must certainly build with reasonable care, having respect to the situation; he is not required to exercise excessive diligence, inconsistent with a reasonable prosecution of his business; and he is required to act with ordinary prudence and forecast.³ He ought to use sound materials and competent skill in the construction of his warehouse.

§ 346. Having once incurred a liability for the negligent injury of goods stored with him, the warehouseman cannot relieve himself from responsibility by showing that after the injury the goods were destroyed without his fault, and that they must have been so destroyed even if no damage had previously occurred.⁴ Injury through his negligence gives the owner a cause of action; and this is not taken from him by a subsequent total loss of the goods by fire or by superior force. The bailee's position here is analogous to that which he occupies after he has been guilty of a conversion of the goods; he cannot change the order of events.⁵ True, where the conversion is merely technical and waived by the owner, the bailee is not liable for a subsequent loss of the goods by fire occurring without his fault.⁶

§ 347. A sale by the owner of goods in the hands of a bailee often gives rise to questions of interest. A valid sale transfers the title, and

¹ Knapp v. Curtis, 9 Wend. R. 60.

² Read v. Spaulding, 5 Bosw. 395; S. C. 30 N. Y. 630; Michaels v. N. Y. Central R. R., 30 N. Y. 564.

³ Bowman v. Teall, 23 Wend. 306; Walden v. Finch, 70 Pa. St. 461; Knapp v. Curtis, 9 Wend. R. 60; Grossman v. Fargo, 6 Hun, 310. See Schwerin v. McKie, 5 Robt. 404, 421; Willett v. Rich, 142 Mass. 356.

⁴ Powers v. Mitchell, 3 Hill R. 545.

⁵ Beach v. Raritan, etc., R. R. Co., 37 N. Y. 457; Disbrow v. Ten Broeck, 4 E. D. Smith, 397.

⁶ Carnes v. Nichols, 10 Gray, 369; Wells v. Kelsey, 38 Barb. 242; 37 N. Y. 143; 15 Abbott Pr. 53; 19 How. Pr. 309.

leaves the goods at the purchaser's risk of loss by fire ; as where grain stored in an elevator is sold, and a receipted bill for the grain is delivered to the purchaser, with an order for the amount accepted by the superintendent of the elevator.¹ The risk of loss accompanied the title ; and hence where the sale operates as a present transfer, the goods are at the risk of the purchaser ;² and where for any reason the title does not pass under the contract, the risk remains with the seller.³

A sale of goods in the hands of a warehouseman does not of itself operate as an assignment of the contract of bailment.⁴ The contract may be assigned, or the transfer of the goods may be brought to the notice of the warehouseman, and being assented to by him, a new contract will arise ;⁵ or a cause of action for the conversion of personal property may be assigned as a chose in action.⁶ Where the goods are transferred, unaccompanied by an assignment of the contract of bailment, the purchaser should demand the goods before bringing his action against the warehouseman ; and he need not do so where a valid cause of action for a conversion is transferred to him. The remedy is to be chosen with care ; the action of trover does not lie against a bailee for losses arising through his omissions or neglect or nonfeasance.⁷

§ 348. A misdelivery of goods by a warehouseman, arising through either mistake or negligence, is treated as a conversion of the property ; it is an unauthorized disposition of the property ;⁸ and that amounts to a conversion, without any wrongful intent.⁹ For the same reason, the bailee by receipting to a stranger, that is, by giving to a third person a receipt acknowledging his title, is by that act guilty of a conversion ; and he cannot afterward claim to hold the goods on the ground of a lien for storage and charges. He is guilty of an act of bad faith, in hostility to the rights of his principal, the true owner ;¹⁰ and on that ground

¹ Russell v. Carrington, 42 N. Y. 118. See Sturtevant v. Orser, 24 N. Y. 538.

² Kimberly v. Patchin, 19 N. Y. 330; Pleasants v. Pendleton, 6 Rand. 473; Terry v. Wheeler, 25 N. Y. 520.

³ Joyce v. Adams, 8 N. Y. 291; Cooke v. Millard, 65 N. Y. 352.

⁴ Suydam v. Smith, 7 Hill, 182; in this case the warehouseman was held to bail in an action of trover. See Brown v. Treat, 1 Hill, 225; Duguid v. Edwards, 50 Barb. 288; and Bates v. Reynolds, 7 Bosw. 685.

⁵ Willard v. Bridge, 4 Barb. 361.

⁶ McKee v. Judd, 12 N. Y. 622; Drake v. Smith, 12 Hun, 532; Richtmeyer v. Remsen, 38 N. Y. 206; Gould v. Gould, 36 Barb. 270; Code of Civil Procedure, § 1910; Serat v. Utica, etc., Ry. Co., 102 N. Y. 681.

⁷ Hawkins v. Hoffman, 6 Hill, 586; it does lie against him for a misdelivery.

⁸ Willard v. Bridge, 4 Barb. 361; Hawkins v. Hoffman, 6 Hill, 586; Bank of Oswego v. Doyle, 91 N. Y. 32, 41.

⁹ Boyce v. Brockaway, 31 N. Y. 490.

¹⁰ Holbrook v. Wight, 24 Wend. 169. The act must be hostile to the owner's interest and title. Fouldis v. Willoughby, 8 Mees. & Wels. 540; Eldridge v. Adams, 54 Barb. 417.

he may be held liable for a conversion of the goods.¹ Much more a sale of goods without authority from the owner is a conversion of them, though made in good faith and on what was believed to be a rightful authority.²

§ 349. When goods are delivered on an agreement that they shall be returned or paid for at an agreed price, and the person to whom they are delivered refuses to account for them or to return the goods, the owner may maintain an action for them; and he may recover as the measure of his damages the actual value of the goods with interest from the time of refusal. The defendant having repudiated the contract, the plaintiff may recover in the action of trover.³ Suing on the contract, the plaintiff recovers the price agreed upon, with interest.⁴ As to third parties, the property in the goods remains unchanged.⁵

§ 350. A warehouseman has at common law a lien upon goods entrusted to him within the line of his business, for his reasonable charges: his lien arose out of a usage of business, repeatedly proved and recognized until it came to be considered an established right.⁶ It seems to have been a matter of doubt whether the lien thus recognized by the common law was specific and thus limited to the particular goods upon which the charges arose, or was general and attached to any goods in the hands of the warehouseman as security for his general balance of account for such charges or services as warehousemen usually incur or perform.⁷ This doubt has been settled by a statute of this state declaring that a warehouseman or person lawfully engaged exclusively in the business of storing goods, wares and merchandise for hire shall have a lien for his storage charges, for moneys advanced by him for cartage, labor, weighing, and coopering paid on goods deposited and stored with him; that such lien shall extend to and include all legal demands for storage and said above described expenses paid which he

¹ *Solomon v. Waas*, 2 Hilton, 179; *Ward v. Forest*, 20 How. Pr. 465.

² *Spraight v. Hawley*, 39 N. Y. 441; *Stephens v. Elwell*, 4 M. & S. 259.

³ *Stevens v. Low*, 2 Hill, 132; *Solomon v. Waas*, 2 Hilton, 179; *Ward v. Forest*, 20 How. Pr. 465.

⁴ *Blot v. Borceau*, 3 N. Y. 78, 84.

⁵ *Connah v. Hale*, 23 Wend. 462; post, § 387.

⁶ *Naylor v. Mangles*, 1 Esq. R. 109; *Spears v. Hartley*, 3 Esp. R. 81; *Trust v. Pirsson*, 1 Hilton, 292, 296.

⁷ *Rex v. Humphrey*, 1 McCl. & T. 194; *Naylor v. Mangles*, 1 Esp. 109; *Spears v. Hartley*, 3 Esp. 81; *Buxton v. Bangham*, 6 Car. & P. 674; *Holderness v. Collinson*, 1 M. & R. 55; 7 B. & C. 212; 3 Pars. on Cont. 268; 2 Kent's Comm. 635; *Schmidt v. Blood*, 9 Wend. 268; *Morgan v. Congdon*, 4 N. Y. 552; *Blake v. Nicholson*, 3 Maule & Sel. 168. See *McFarland v. Wheeler*, 26 Wend. 467, opinion by Senator VERPLANK; and *Lowe v. Martin*, 18 Ill. 286; *Sears v. Wills*, 4 Allen, 212.

may have against the owner of the goods stored; and that it shall be lawful for him to detain the goods until such lien is paid.¹ Under this statute a warehouseman has a general lien upon the goods in his possession for all his charges.²

A warehouseman cannot assert a lien on goods deposited with him without any authority from the owner;³ and where he has a lien, he waives it by surrendering the property or by claiming to hold it tortiously and in violation of the owner's right.⁴

§ 351. Usage and custom are often appealed to for the purpose of ascertaining the rights, as well as the duties of warehousemen. When that is the known and established custom, they have a right to receive goods from a carrier, in apparent good order, and advance to him his reasonable charges, and hold them subject to the lien of the carrier for the amount so advanced; and where they deliver to the owner without exacting immediate payment, they may maintain a suit against the owner to recover the amount advanced under the custom. Receiving the goods in apparent good order, they do not acquire simply the carrier's interest subject to any claim there may be against him for damages; they do not stand in the relation of assignees of the carrier's charges; and they do not assume the burden of showing that the goods were not injured while in the custody of the carrier. The owner must look to the carrier for his damages, and cannot recoup them in an action by the warehouseman.⁵ The custom is the same as that which obtains between successive carriers, for the general convenience of business; being known and established, it enters into the contract between the parties.⁶ And it is not considered as binding, where the goods are shipped without authority from the owner, or where the freight is paid in advance.⁷

¹ Laws of 1885, Chap. 526.

² *Stallman v. Kimberly*, 121 N. Y. 393.

³ *Buxton v. Banghan*, 6 C. & P. 674; L. R. 9 Exch. 632. If, after default in the payment of the debt secured by a chattel mortgage, the mortgagor, without the knowledge of the mortgagee, stores the mortgaged chattels in a warehouse, the lien of the warehouseman for storage will be subordinate to the lien of the mortgage. The statute does not give the warehouseman a specific lien for the storage of goods deposited with him against the goods themselves irrespective of by whom deposited and by whom owned. *Baumann v. Post*, 26 Abb. N. C. 134; 34 St. Rep'r, 308.

⁴ *Hollbrook v. Wight*, 24 Wend. 169, 179.

⁵ *Sage v. Gittner*, 11 Barb. 120; *Alden v. Carver*, 13 Iowa, 253; *Bowman v. Hilton*, 11 Ohio, 303; *Hunt v. Haskell*, 24 Me. 339.

⁶ *Lee v. Salter, Hill & Denio*, 163. See *Cooper v. Kane*, 19 Wend. 386; *Dawson v. Kittle*, 4 Hill, 107.

⁷ *Robinson v. Baker*, 5 Cush. 137; *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Stevens v. Boston & W. Railroad*, 8 Gray, 262; *Allen v. Smith*, 8 Cowen, 301; *Briggs v. Boston & Lowell R.*, 6 Allen, 243.

§ 352. A usage of business may also be shown to interpret a written receipt of grain *in store* or *on freight*. Being in the nature of a contract, it is not open to contradiction in the sense of the rule applicable to receipts proper; still, the import of its terms, where these are ambiguous, is controllable by the usage among grain dealers, where the usage is so universal and well known that the jury are bound to consider it parcel of the contract. The custom is proved as a means of ascertaining the meaning of the language used; and hence the terms employed must prevail in the ordinary sense attached to them, unless it is shown that these have, by a well-known usage of trade, a different signification. The custom is appealed to as explanatory of the transaction, and as showing the intention of the parties.¹ It cannot be proved where the contract is definite and certain; and it cannot be proved to vary a settled rule of law.² The circumstances may be proved, and the antecedent relation of the parties, including a previous parol contract, to interpret a written receipt of goods *to be forwarded*.³

§ 353. It is the warehouseman's duty to redeliver the goods, on being paid or tendered his reasonable charges. As in other cases, the delivery must be so made as to charge the owner with the custody of the property; and the bailee is discharged as soon as that is done.⁴ Holding by a delegated right, a warehouseman is not permitted as a rule to dispute the title of his principal; he is not allowed to set up a personal claim to the property; and he is *prima facie* bound to restore the goods to his bailor.⁵ The rule rests upon the assumed admission by the bailee of the bailor's title; it does not rest on the ground of an estoppel. It does not apply where the property is taken from the bailee by process of law or by a paramount title;⁶ or where the bailee on demand delivers the goods to the true owner.⁷ For his own safety, the bailee

¹ Goodyear v. Ogden, 4 Hill, 104; Dawson v. Kittle, 4 Hill, 107. The terms of a contract, though in the form of a receipt, must prevail; they cannot be varied by parol evidence. Wadsworth v. Allcott, 6 N. Y. 64, 71. See Mallory v. Willis, 4 N. Y. 76; Bradley v. Wheeler, 44 N. Y. 495, 504; Furniss v. Hone, 8 Wend. 247.

² Markham v. Jaudon, 41 N. Y. 235, 245; Townsend Manuf. Co. v. Foster, 51 Barb. 346; Larrowe v. Lewis, 44 Hun, 226; Sims v. United States Trust Co., 35 Hun, 533.

³ Blossom v. Griffin, 13 N. Y. 569. A warehouseman's receipt is often merely an item of evidence; its legal effect depends upon the situation of the parties. Gardiner v. Suydam, 7 N. Y. 357.

⁴ Tittsworth v. Winnegar, 51 Barb. 148.

⁵ Bates v. Stanton, 1 Duer, 79; Simpson v. Wrenn, 50 Ill. 222.

⁶ Edson v. Weston, 7 Cowen, 278; Stamford Steam B. Co. v. Gibbons, 9 Wend. 327; Cook v. Holt, 48 N. Y. 275; Edson v. Weston, 6 Cranch, 278; Agle v. Atherton, 5 Taunt. 758; Burton v. Wilkinson, 18 Vt. 186. See Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57.

⁷ Hardman v. Wilcock, 9 Bing. 382; King v. Richards, 6 Whart. R. 418; Mullens v. Chickering, 110 N. Y. 513; Western Transp. Co. v. Barber, 56 N. Y. 544, 552.

should leave a stranger claiming the property to his action, and give the bailor notice of the suit. This course will protect him, and save him the inconvenience of a litigation on behalf of the bailor.¹

§ 354. In actions against warehousemen, as against other bailees, the onus of proof rests with the party holding the affirmative on the pleadings. The plaintiff must prove the fact, where his right to recover is based upon an allegation of loss through the defendant's negligence; he must sustain his action by such proof as the circumstances naturally call for.² Negligence is a wrong, and not to be presumed. Proof of a total failure to return the goods on demand or to account for the property is *prima facie* sufficient;³ the failure is itself evidence of a conversion.⁴ The bailee cannot fairly remain silent under a demand; he is bound to give some account of the property.⁵ If he returns only a part of the goods, or returns them in a damaged condition, he ought to show what has become of the missing goods, or how the damage arose. Being in possession of the property at the time of the loss or injury, and charged with its custody, he ought to explain the loss or the injury; he has the means of doing so; the explanation comes naturally from him.⁶

¹ Rogers v. Weir, 34 N. Y. 463; Bliven & Mead v. Hudson River R. R., 36 N. Y. 403. See Carroll v. Mix, 51; Barb. 212; and Barnard v. Kobbe, 3 Daly, 35, 373; and Ball v. Liney, 48 N. Y. 6; Welles v. Thornton, 45 Barb. 390, 395; Scranton v. Farmers & Mechanics' Bank, 24 N. Y. 424, 427; Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57.

² Lamb v. Camden & Amboy R. R. & T. Co., 46 N. Y. 271, 278.

³ Bush v. Miller, 13 Barb. 483; Schmidt v. Blood, 9 Wend. 268; Claflin v. Meyer, 75 N. Y. 260, 262; Fairfax v. New York Cent. & H. R. R. Co., 67 N. Y. 11; Steers v. Liverpool Steamship Co., 57 N. Y. 1; Burnell v. New York Cent. R. R. Co., 45 N. Y. 184; Schwerin v. McKie, 5 Robt. 404; S. C. 51 N. Y. 180; Higgins v. Emmons, 5 Conn. 76. But where the failure to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and it will not be assumed in the absence of evidence on that point that the fire or theft was the result of his negligence. Claflin v. Meyer, 75 N. Y. 260, 262; Lamb v. Camden & Amboy R. R. Co., 46 N. Y. 271; Schmidt v. Blood, 9 Wend. 268; Mills v. Gilbreth, 47 Me. 320; Stewart v. Stone, 127 N. Y. 500, 506.

⁴ Dunlap v. Hunting, 2 Denio, 643; Cairnes v. Robbins & Mills, 8 Mees. & Wels. 258; Rose v. Hill, 2 Man. Gr. & Scott, 787.

⁵ Arent v. Squire, 1 Daly, 347.

⁶ Clark v. Spencer, 10 Watts Pa. 337; Rex v. Burditt, 4 B. & A. 161; Schwerin v. McKie, 51 N. Y. 180; Claflin v. Meyer, 75 N. Y. 260, 262. In Platt v. Hibbard, 7 Cowen, 498, 500, the rule was laid down in these terms: "When property entrusted to a warehouseman, wharfinger, or storing or forwarding merchant, in the ordinary course of business, is lost, injured or destroyed, the weight of proof is with the bailee, to show a want of fault or negligence on his part; or in other words, to show that the

§ 355. WHARVES.

The wharves and piers used in our seaports to facilitate the shipment and landing of goods are generally devoted, like highways, to the public use; the owners of them are bound to keep them in a safe condition; and the lessee is bound to keep them in repair.¹ The ownership of those which are used in this manner is qualified by the right of the public to go and return upon them; and the owner's possession is qualified in like manner: neither he nor his tenant can exclude the public from the reasonable use of the premises. This blending of public and private rights is created by the law of the State; it is necessary in order to promote the construction and proper enjoyment of wharves, piers and slips. The essence of the ownership in them, allowed by law, when constructed for the public use, is the right to collect wharfage from ships and vessels using them, in the ordinary way, to receive or discharge their cargo.² Erected on navigable waters, the public have an implied license to use them in the customary way;³ erected and used as private property, the public have no right to enter upon them.⁴

injury did not happen in consequence of his neglect to use all that care and diligence on his part that a prudent or careful man would exercise in relation to his own property." In *Schmidt v. Blood*, 9 Wend. 268, the warehouseman offered to show that the goods had been purloined, and the evidence being excluded, the court on review granted a new trial, with this remark: "The onus of showing negligence seems to be upon the plaintiff, unless there is a total fault in delivering or accounting for the goods." Approved in *Foot v. Storrs*, 2 Barb. 326; and in *Harrington v. Snyder*, 3 Barb. 380; and in *Wiggins v. Hathaway*, 6 Barb. 632; and in *Bush v. Miller*, 13 Barb. 481; and in *Davison v. Owners of Crystal Palace*, 9 How. Pr. 6; and in *Williams v. Holland*, 22 How. Pr. 137; and in *Schwerin v. McKie*, 5 Robt. 404; S. C. 51 N. Y. 180; where a part of the goods were not redelivered, it was held that the burden of proof as to diligence was on the warehouseman. The authorities are conflicting in regard to the burden of proof. See cases cited by counsel in *Lamb v. Camden & Amboy R. R. & T. Co.*, 46 N. Y. 274, and by *PECKHAM, J.*, in his dissenting opinion—*id.* 289. See *Cass v. Boston & Lowell Railroad Co.*, 14 Allen, 448; and *Baron v. Eldredge*, 100 Mass. 460; post, § 446.

¹ *Radway v. Briggs*, 37 N. Y. 256; *Wendell v. Baxter*, 12 Gray, 494; *Pittsburgh City v. Grier*, 22 Penn. St. 54; *Lan. Canal Co. v. Parnaby*, 11 Ad. & Ell. 223; *Thompson v. N. E. Railway Co.*, 3 Best & Smith, 106; *Smith v. London & St. K. Docks Co.*, L. R. 3 C. P. 326; 37 L. J. C. P. 217.

² *The Mayor, etc., of N. Y. v. Rice*, 4 E. D. Smith, 604; *Taylor v. Atlantic M. Ins. Co.*, 37 N. Y. 275. See further under the laws relating to the City of New York: *Marshall v. Guion*, 11 N. Y. 461; *Furman v. New York City*, 10 N. Y. 567; and *Brooklyn*: *Wetmore v. The Brooklyn Gas Light Co.*, 42 N. Y. 384; *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70.

³ *Heaney v. Heaney*, 2 Denio, 625; *Swords v. Edgar*, 59 N. Y. 28.

⁴ *Wetmore v. Brooklyn Gas Light Co.*, supra; *Collett v. London & N. R.*, 16 Ad. & Ell. N. R. 984, 989; *Pittsburgh City v. Grier*, 22 Penn. St. 54; *Thompson v. Mayor, etc.*, 11 N. Y. 115.

§ 356. WHARFINGERS.

The similarity of their duties, often performed by the same persons, has occasioned the terms warehousemen and wharfingers to be used sometimes in the books interchangeably, as if they conveyed substantially the same meaning. But this is inaccurate; the warehouseman receives goods and merchandise into his warehouse to be stored for hire; and the wharfinger keeps a wharf, for the purpose of receiving and shipping merchandise to or from it for hire. They are historically and actually distinct branches of business, and yet they are often united; as where a wharfinger procures and appropriates a warehouse on the wharf, and assumes also the duties and the character of a warehouseman.¹

§ 357. The wharfinger's responsibility begins as soon as he acquires the custody of the goods, and ends when he has fulfilled his express or implied contract with respect to them. What will amount to a delivery of the goods to him, so as to charge him with the custody of them, depends very much upon the custom and usages of the business. A mere delivery at the wharf is not enough, unless accompanied with express notice, under such circumstances as will imply a consent on his part to receive them.² If it be according to the custom and understanding of the parties, a delivery of the goods on the wharf with notice will be sufficient to charge the bailee.³ If the goods be received into a warehouse situated on the wharf, to be forwarded, the bailee, it seems, does not hold them as a wharfinger; he is a warehouseman just the same as if his storehouse stood in some other part of the town.⁴ Some of the English cases speak of and treat him, under these circumstances, as a wharfinger.⁵ But names are not material, since the duties incident to his situation and character are the same by whatever name he is called. If he receive the goods on the wharf, to forward by a carrier as soon as he can find an opportunity, and in the mean time stores them in his warehouse; the measure of his responsibility remains all the while the same; he is bound to exercise the ordinary diligence and care of a prudent man in their preservation.⁶

¹ Bouvier's Law Dictionary; and *White v. Humphrey*, 11 Adolph. & Ellis, 43.

² *Gibson v. Inglis*, 4 Camp. 72; *Buckman v. Levi*, 3 Camp. 414; *Packhard v. Getman*, 6 Cowen, 757; *Grosvenor v. The N. Y. C. R. R. Co.*, 39 N. Y. 34; *Etna Ins. Co. v. Wheeler*, 5 Lansing R. 480. The delivery must be made to some one authorized to receive the goods. *Leigh v. Smith*, 1 C. & P. 638; *R. & M.* 224.

³ *Cobban v. Donne*, 5 Esp. 41.

⁴ *Platt v. Hibbard*, 7 Cowen, 497.

⁵ *White v. Humphrey*, 11 Adolph. & Ellis, 43.

⁶ *Matter of Webb and others*, 8 Taunt. R. 443; *Quiggin v. Duff*, 1 Mees. & Wels. 174; *Platt v. Hibbard*, *supra*; *Roberts v. Turner*, 12 John. R. 232; *Brown v. Denison*, 2 Wend. 593; *Dillon v. N. Y. & Erie R. R. Co.*, 1 Hilton, 231.

§ 358. It has been sometimes said that the duties of a wharfinger are similar to those of a common carrier. The authorities do not sustain the proposition. Lord Ellenborough, it is true, in one instance at *Nisi Prius*, where the goods had been accidentally destroyed by fire while in the hands of the wharfingers, does speak of their liability as similar to that of a carrier; but the case did not turn upon that point; it was a part of the duty of the defendants, as lightermen, to convey the goods from the wharf in their own lighters to the vessel in the river, on which they were to be shipped; but it appeared in evidence, and was allowed to control the case, that the defendants had limited their liability, so as not to cover a loss by fire, by giving notice to the vendor of the goods to that effect.¹ The other cases cited in support of the doctrine are simply *dicta* of the judges, made incidentally in the course of a trial on principles not involved in the decision of the court.²

§ 359. The liability of a wharfinger is not distinguishable in degree from that of a warehouseman; both are bound to take common and reasonable care of the goods delivered to them. What will be regarded as ordinary care and diligence, is generally a question of fact for the jury, to be determined from the circumstances of the case. The wharfinger, of course, will not be required to take the same care of lumber received and piled upon his wharf as he takes of merchandise and such goods as may be easily purloined and stolen. The nature of the article, the time of the deposit, and the dangers to which it is exposed are all proper circumstances to be considered in determining the diligence demanded of the bailee; for in this manner alone can it be ascertained that he has exercised, or failed to exercise, the ordinary care and diligence of a prudent man; a failure in which degree of care renders him liable.³

As the same rule applies to both of these classes of bailees, the decisions in respect to the liabilities of warehousemen are in point to illustrate the duties of wharfingers in taking care of the articles bailed. They are to use ordinary diligence in keeping and guarding the property, while in their possession, and in delivering or forwarding it; hav-

¹ *Maving v. Todd*, 1 Stark. R. 59; 4 Campb. 225.

² *Ross v. Johnson*, 5 Durr. 2827; *Isaack v. Clerk*, Moore, 841; 7 Cowen, 562, note by the reporter. This distinction between the argument of the judge and the judgment of the court, familiar to all lawyers, is always material. On the precise issue presented, the judicial decision is the authoritative witness of what the law is; but the argument with which it is sustained is only matter of illustration, that derives its weight from the individual character of the judge and the inherent force of his reasoning.

³ *White v. Humphrey*, 11 Adolph. & Ellis R. 43; 1 Mees & Wels. 174; *Foote v. Storrs*, 2 Barb. 326; 10 Watts, 235; *Blin v. Mayo*, 10 Vt. 56; *Hatchett v. Gibson*, 13 Ala. R. 587; *Hemphill v. Chenie*, 6 Watts & Serg. 62, 75.

ing used such diligence they are no longer liable, though the goods be destroyed by fire, stolen by thieves, or embezzled by the person having them in charge.¹

§ 360. The wharfinger is not responsible for goods casually burnt upon his premises. But where he gets them insured against loss by fire, and they are burned, and the insurance money is paid to him, the owner may recover of him the moneys representing the value of his goods, after deducting the lien and expenses. The bailee derives his interest from the owner, and the insurance must be deemed to have been made for his protection, after satisfying the legal demands of the agent.² The same rule has been applied in favor of the owner of goods, insured by his factor without being requested so to do. The bailee has an insurable interest in the goods, and on the happening of a loss by fire he recovers their full value; pays his own debt on account of the property, and holds the residue in trust for the owner.

§ 361. Wharfingers are answerable for their servants; and where they provide the men to do the work of unloading vessels, and permit no others to be employed thereon, they are responsible for the negligence of their servants, in unloading the goods, although they derive no profit from their labor. By keeping the wharf and furnishing the men, they make the business their own, and must answer for losses occurring through the negligent manner in which the work is done.³ As masters of the business, they must answer for the negligent conduct of their agents and servants.

§ 362. The wharfinger is bound to return or deliver the goods according to his contract; and it is his duty to deliver at the proper place and to a person authorized to receive the property.⁴

A wharfinger stands in the same relation to the title as a warehouseman; he derives his interest in the goods and his right of control over them from the owner; he admits the title of the party from whom he receives them, just as a tenant admits the title of the landlord under whom he holds.⁵ He does the same thing when, after a sale of the

¹ *Brown v. Denison*, 2 Wend. 593; *Schmidt v. Blood*, 9 Wend. 268. See *Roberts v. Turner*, 12 Johns. 232; *Garside v. Trent Nav. Co.*, 4 T. R. 581; *Ackley v. Kellogg*, 8 Cow. 223; *Seymour v. Brown*, 19 Johns. 44; *Chenowith v. Dickinson*, 8 B. Mon. R. 156; ante, §§ 333, 344, 345, 354.

² *Sideways v. Todd*, 2 Stark. R. 400; *Waters v. Monarch Life and Fire Ins. Co.*, 5 El. & Bl. 870; 25 L. J. Q. B. 102. See *Siter v. Morris*, 13 Pa. St. 218; *Stillwell v. Staples*, 19 N. Y. 401; *Lee v. Adsit*, 37 N. Y. 78; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606.

³ *Gibson v. Inglis*, 4 Campb. 72; *Coggs v. Bernard*, 2 Ld. Raym. 909; ante, § 343.

⁴ *Cobban v. Downe*, 5 Esp. 41; *Leigh v. Smith*, 1 C. & P. 638; *R. & M.* 224.

⁵ *Gosling v. Birnie*, 7 Bing. 339; 5 M. & P. 160.

goods in his hands, he recognizes the right of the purchaser, by accepting a delivery order for the property: and he cannot afterward dispute the title thus acknowledged.¹ He cannot set up title in himself existing at the time he received the goods; and it is believed he cannot set up title in a third person unless he connects himself with it. He can show that the bailor's title has terminated since the bailment, that he has delivered the property to the owner, or that the property has been taken from him by legal process, or that a recovery has been had against him for the property in an action of which the bailor had notice.² And though guilty of a conversion of the goods, in refusing to deliver them on demand, he may show in mitigation of damages a subsequent seizure and sale of the goods under a process against the bailor.³

§ 363. The law considers the substance of a contract, rather than its form. A contract made by a carrier *to forward* goods to a point beyond the termination of his line makes him a common carrier for the whole distance: in substance his agreement is to carry and deliver the goods to the place of destination, and he does not become a mere forwarder at the termination of his line. His contract covers the entire transportation, including each transshipment; and the law enforces the contract. It assumes also that the agent of a railway company may bind his principals by a contract for carriage over other roads running in connection with his own; ⁴ and the validity of the contract does not depend upon

¹ Hall v. Griffen, 3 M. & Scott, 732; 10 Bing. 216; Woodley v. Coventry, 2 H. & C. 164; 9 Jur. 2 C. & M. 531; 4 Tyr. 290.

² Western Tr. Co. v. Barber, 56 N. Y. 544, 552; Biddle v. Bend, 6 Best & Smith, 224; Cook v. Holt, 48 N. Y. 275; Burton v. Wilkinson, 18 Vt. 186; Mullins v. Chickering, 110 N. Y. 513.

³ Higgins v. Whitney, 24 Wend. 379; Sherry v. Schuyler, 2 Hill, 204; Curtis v. Ward, 20 Conn. 204. See Wehle v. Butler, 61 N. Y. 245, 249; Hammer v. Wilsey, 17 Wend. 91; Otis v. Jones, 21 Wend. 394; Lyon v. Yates, 52 Barb. 237; Sprague v. McKinzie, 63 Barb. 60; Peak v. Lemon, 1 Lans. 295; Pierce v. Benjamin, 14 Pick. 356; Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57, 67. It is not the seizure that gives the defense in mitigation of damages, but the application of the proceeds of the property to the payment of the bailor's debts. Per EARL, C., in Ball v. Liney, 48 N. Y. 6.

⁴ Wilcox v. Parmelee, 3 Sand. R. 610; a contract *to forward* goods from New York to Fairport, Ohio; the defendant's line terminating at Buffalo, from which the goods were to be shipped by vessel: held a carrier's contract to Fairport. The same interpretation is given to a similar contract in Read v. Spaulding, 5 Bosw. 394, 404; S. C. 30 N. Y. 630. See also, Fairchild v. Slocum, 19 Wend. 329; Weed v. S. & S. R. R. Co., 19 Wend. 534; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Mobile & Girard R. R. Co. v. Copeland, 63 Ala. 219; Erie Ry. Co. v. Wilcox, 84 Ill. 239. The contract is to be enforced in its true sense; and the circumstances may show that the agreement was in fact that of a forwarder from the end of the carrier's route. Reed v. U. S. Ex. Co., 48 N. Y. 462.

the agent's authority to bind the connecting lines.¹ The contracting carrier assumes the liability of the connecting lines engaged in completing the transportation.² Without an express contract, the carrier in this and other States of the Union does not by receiving goods marked or addressed to a place beyond the terminus of his route, impliedly contract to carry them to the place of their destination; his implied engagement is to carry them to the end of his route and there deliver them to the next carrier;³ and until the delivery is made his liability remains undiminished.⁴ His duties at the end of his route are in some particulars like those of a forwarder; he must send the goods forward according to his contract, whether expressed or implied; and in the absence of an agreement, he must send them by a responsible carrier, pursuant to his instructions.⁵ But he does not act as a forwarder, or simply under the liability of a wharfinger in the transshipment of the goods.⁶

§ 364. LIENS.

A wharfinger has at common law a lien upon the goods entrusted to him, to the extent of his reasonable charges; a general lien on the goods of his customer in his possession, for his balance in respect of freight and wharfage.⁷ His general lien for the balance of his accounts does not cover charges for labor or for warehouse room, where there is no contract to that effect, express, or implied from a general continued and undisputed usage.⁸ His lien does not attach unless the goods are landed

¹ Hart v. R. & S. R. Co., 8 N. Y. 37; Milnor v. New York & N. H. R. R. Co., 53 N. Y. 363.

² Quimby v. Vanderbilt, 17 N. Y. 306; Williams v. Vanderbilt, 28 N. Y. 217; Buffett v. Troy & Boston R. R. Co., 40 N. Y. 168, and note 179; Milnor v. N. Y. & N. H. R. R. Co., 53 N. Y. 363; Manhattan Oil Co. v. C. A. R. R. & T. Co., 54 N. Y. 197.

³ Root v. The Great Western R. R. Co., 45 N. Y. 524; Burtis v. Buffalo and State Line R. Co., 24 N. Y. 269; Rawson v. Holland, 59 N. Y. 611; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438; Knight v. Providence & Worcester R. R. Co., 13 R. I. 572; Goldsmith v. Chicago & Alton R. R. Co., 12 Mo. App. 479; Knott v. Raleigh & G. R. R. Co., 98 N. C. 73; Crouch v. Louisville, etc., R. R. Co., 42 Mo. App. 248. See Lamb v. Camden & Amboy R. & Tr. Co., 46 N. Y. 271; Babcock v. L. S. & M. S. R. Co., 49 N. Y. 491.

⁴ Johnson v. N. Y. C. R. R. Co., 31 Barb. 196; S. C., 33 N. Y. 610; McDonald v. Western R. R. Corp., 34 N. Y. 497; 3 Lansing, 265.

⁵ Johnson v. N. Y. Central R. R. Co., 33 N. Y. 610; Hinckley v. N. Y. C. & H. R. R. Co., 56 N. Y. 429; St. John v. Van Santvoord, 6 Hill, 157; 8 Cowen, 223.

⁶ McDonald v. Western R. R. Corp., 34 N. Y. 497; Mills v. Michigan Central R. R. Co., 45 N. Y. 622; 52 N. Y. 262.

⁷ Naylor v. Mangles, 1 Esp. 109; Spears v. Hartley, 3 Esp. 81; Rushforth v. Hadfield, 6 East, 519; 7 East, 224. See Sage v. Gittner, 11 Barb. 120; Dresser v. Bosanquet, 4 B. & S. 460; 116 E. C. L. R.

⁸ Holderness v. Collinson, 1 M. & R. 55; 7 B. & C. 212. In Naylor v. Mangles (1

on his wharf.¹ And where the goods in his hands are sold, and the owner pays his charges to the date of the sale, giving him notice of the fact, he cannot acquire any further demand against the vendor on account of the goods.²

The wharfinger has a lien on a vessel for wharfage;³ and where the vessel is secretly or wrongfully removed from the wharf, and afterward brought back without force or fraud, his lien is revived. The law gives him a lien as a means of collecting his charges; and where the vessel departs with the goods, leaving the wharfage unpaid, the wharfinger may recover his demand from the owner.⁴

The lienholder waives or loses his lien by surrendering the possession of the property;⁵ or by entering into a contract or into a course of dealing under which goods are to be received and delivered, without requiring prepayment of charges thereon.⁶ This results from the nature of a lien; which is not an estate or interest in the property, neither a *jus ad*

Esp. 109), Lord Kenyon said liens were either by common law, usage or agreement; that a lien from usage was matter of evidence; that the usage in the present case had been proved so often it should be considered a settled point; and that liens by common law arose where a party was obliged to receive the goods. In *Spears v. Hartley* (3 Esp. 81), Lord Eldon considered the wharfinger's lien for the balance of a general account as perfectly settled, and that he might hold the goods under it after the demand is barred by the statute of limitations. In *Holderness v. Collinson* (7 B. & C. 212), the general lien for wharfage was admitted; but the court refused to allow a lien claimed for laborage (comprising landing, weighing and delivering) and warehouse rent; because the custom proved was not sufficiently certain and uniform to lay a foundation upon which an express or implied contract could be found, to act upon it. In *Rushforth v. Hadfield*, 6 East, 519, an effort was made to establish the carrier's right to a lien for his general balance on the ground of a general usage; and the court allowed that a contract to that effect might be established by proof of a usage or course of dealing between the parties, and declined to uphold the usage as creating a rule of law. S. C. 7 East, 224, the court held the same doctrine, that the claim was against the general law of the land, and therefore to be regarded with jealousy. In *Kirkman v. Shawcross*, 6 Term, 14, the court held valid a general agreement entered into by a number of dyers, dressers and bleachers, that they would not receive goods to be dyed, dressed or bleached, but on condition that they should respectively have a lien on such goods for their general balance; and that persons afterward delivering goods to them with knowledge of it must be taken to have assented to the terms of the agreement. A. D. 1794.

¹ *Seyds v. Hay*, 4 Term R. 260.

² *Barry v. Longmore*, 12 A. & E. 639.

³ *The Phebe*, Ware, 354.

⁴ *Gilpin* R. 101; *Fitzsimmons v. Milner*, 2 Rich. R. 370.

⁵ *Jordan v. James*, 5 Ham. R. 88; *Jones v. Pearle*, 1 Str. 556; *Houghton v. Mathews*, 3 Bos. & Pull. R. 485.

⁶ *Dunham v. Pettee*, 1 Daly, 112; *Crawshay v. Homfray*, 4 B. & Ald. 50; *Chase v. Witmore*, 5 M. & S. 306; *Hutton v. Brugg*, 2 Marsh, 345.

rem, nor a *jus in re*, but a simple right to retain the property till the charges thereon are paid.¹

§ 365. A factor has a particular lien on the goods entrusted to him, for his charges incurred on their account; a general lien on the goods in his possession for the balance of his account arising in the course of dealings between him and his principal; and also a lien upon the proceeds of his principal's property sold by him as a factor, and upon the securities taken by him on the sale.² His lien covers advances and liabilities assumed, commissions and customary charges; and it attaches to the goods when they come into his lawful possession.³ He acquires his lien when he accepts the consignment on the terms proposed to him, and receives the property.⁴ Until the property reaches him, the consignor has the power, even in violation of his agreement with the consignee, to pledge the bill of lading as a security for the payment of a draft drawn against the consignment; and where this is done, the consignee must accept the draft or he will not be entitled to receive the property.⁵ The transfer of the bill of lading for value prevails against the consignee or factor's lien for a general balance.⁶

§ 366. Receiving goods with knowledge that advances have already been made upon them, the factor receives them subject to existing rights.⁷ But his lien for his general balance will attach, where he receives the goods without any knowledge of such previous advances.⁸ And where the consignee or factor himself makes advances upon the property by accepting and paying a draft with the bill of lading attached, he is entitled to protection as a *bona fide* purchaser; his right is superior to that of the unpaid vendor of the goods;⁹ he is entitled to hold the property.¹⁰

Not only has the factor a right to hold the goods as security for advances made upon them; it is his duty to do so; he must look to the proceeds of the sale as the primary fund out of which they are to be

¹ Meany v. Head, 1 Mason R. 319.

² Bryce & Rennie v. Brooks, 26 Wend. 367, 374; Green v. Farmer, 4 Burr. 2218; Walker v. Birch, 6 Term R. 262; Vail v. Durant, 7 Allen, 408; Meyer v. Jacobs, 1 Daly, 32; McGraft v. Rugee, 60 Wis. 406; Weed v. Adams, 37 Conn. 378.

³ Bank of Rochester v. Jones, 4 N. Y. 497; Mitchell v. Ede, 11 Adolph. & Ellis, 888.

⁴ Winter v. Coit, 7 N. Y. 288; Beebe v. Mead, 33 N. Y. 587.

⁵ Marine Bank of Chicago v. Wright, 48 N. Y. 1.

⁶ Conrad v. Atlantic Ins. Co., 1 Peters, 444; Allen v. Williams, 12 Pick. 297; First Nat. Bank of Cincinnati v. Kelly, 57 N. Y. 34, and cases there cited.

⁷ Allen v. Williams, *supra*; Barry v. Longmore, 12 Adol. & Ellis, 639. See Buckley v. Packard, 20 John. R. 421.

⁸ Reynolds v. Davis, 5 Sandf. 267.

⁹ Rawles v. Deshler, 28 How. Pr. R. 66; S. C. 3 Keyes, 572.

¹⁰ Wood v. Orser, 25 N. Y. 348. See Nagle v. McFeeters, 97 N. Y. 196.

paid. After that is exhausted, he may have recourse to his principal for the balance remaining unpaid.¹

§ 367. A factor is a commercial agent; and a factor for sale, under advances, is something more than an agent; he is a conditional purchaser for value, with a right to sell the goods, unless the owner on request repays the advances.² Receiving goods to sell under a *del credere* commission, guaranteeing his sales, he becomes a purchaser in effect, as soon as the purchase money becomes due on the sales made by him.³

§ 368. The law gives the factor a lien for his advances and reasonable charges, arising or made in the course of his business; it does not give him a lien to secure debts which accrued prior to the commencement of his agency;⁴ nor to secure a liability incurred by him merely as surety for his principal;⁵ nor to secure the payment of a debt due from any person except the owner of the property.⁶ It does not suffer him to acquire a lien upon goods, the possession of which he acquires in bad faith or by an illegal act;⁷ and it does not give him a lien for expenses incurred upon goods, where he is indebted to his principal, on account of previous sales, in a greater sum;⁸ nor where the goods come into his hands without authority from the owner.⁹

No lien arises in favor of a factor which is inconsistent with the terms of his contract.¹⁰ And after a lien attaches, it is waived by an agreement which is inconsistent with a continuance of the lien, or looks to another security or mode of payment;¹¹ or which accepts the personal

¹ *Gihon v. Stanton*, 9 N. Y. 476.

² *Parker v. Brancker*, 22 Pick. 40; *Brown v. McGraw*, 14 Peters, 479; *Edwards on Bills and Notes*, 422-424. See *Marfield v. Goodhue*, 3 N. Y. 62; *Hilton v. Vanderbilt*, 82 N. Y. 591.

³ That the contract is original and not within the statute of frauds, see *Wolff v. Koppel*, 5 Hill, 458; 2 Denio, 368; *Sherwood v. Stone*, 14 N. Y. 267; *Cartwright v. Greene*, 47 Barb. 9; *Boston Carpet Co. v. Journeay*, 36 N. Y. 384.

⁴ *Houghton v. Mathews*, 3 Bos. & Pull. 485, 488.

⁵ *Drinkwater v. Goodwin*, Cowp. 251; *Dodge v. Wilson*, 10 N. Y. 579.

⁶ *Barry v. Longmore*, 12 Adol. & Ellis, 639; *Snook v. Davidson*, 2 Campb. 218, 597; *Brandao v. Barrett*, 2 Scott N. R. 113; 1 East, 335.

⁷ *Kinlock v. Craig*, 3 Term, 119; *Bruce v. Wait*, 3 Mees. & Wels. 15; *Bank of Rochester v. Jones*, 4 N. Y. 497, 501. See *Soltau v. Gerdaul*, 119 N. Y. 380; *Kinsey v. Leggett*, 71 N. Y. 387; *Howland v. Woodruff*, 60 N. Y. 75; *Collins v. Ralli*, 20 Hun, 247; S. C. 85 N. Y. 637; *Hentz v. Miller*, 91 N. Y. 64.

⁸ *Enoch v. Wehrkamp*, 3 Bosw. 398; *McGraft v. Rugee*, 60 Wis. 406; *Weed v. Adams*, 37 Conn. 378; *Beebe v. Mead*, 33 N. Y. 587.

⁹ *Martini v. Coles*, 1 M. & S. 140; *Buckley v. Packard*, 20 John. R. 421; 18 John. R. 24; *Bruce v. Wait*, supra.

¹⁰ *Chase v. Westmore*, 5 Maule & Selw. 180; *Trust v. Pirsson*, 1 Hilton, 293; *W. Manufactory v. Huntley*, 8 N. H. 441.

¹¹ *Bryce v. Brooks*, 26 Wend. 367; *Cowell v. Simpson*, 16 Ves. 276.

credit of the principal for the balance due ;¹ or which provides a new security for the debt payable on a future day.²

§ 369. HIRE OF THINGS.

One who hires goods or chattels for use acquires a possessory interest in them during the term of his contract ;³ he in fact contracts for, or purchases the use of the chattels for the period or purposes of the contract.⁴ The price paid is the consideration for the use ; so that the hirer becomes the temporary proprietor of the things bailed. One who hires a flock of sheep for a year acquires the right to the increase of the flock ;⁵ and an interest in them, which, for the time being, entitles him to hold them against the owner himself. It is a bailment of mutual interest and reciprocal obligation.

Where one delivers personal property to another, to be returned after a certain time, at the expiration of the term the same identical property reverts to, and the title is in the bailor ; and he may take it from one having a wrongful possession, without being liable to an action of trespass. It is otherwise where the contract of the bailee is in the alternative ; either to return the property bailed or deliver property of the same kind and quality ; or where the contract is to do the latter only. In either of these cases, the obligation on the part of the bailee rests in contract ; and till he actually make the delivery, though the term has expired, the bailor has no vested interest in the property.⁶ Where by the agreement the identical thing is to be returned, the contract amounts to a lease of personal property, at a rent, for a term, after

¹ *Dunham v. Pettee*, 1 Daly, 112.

² *Hewison v. Guthrie*, 3 Scott, 298.

³ *Putnam v. Wyley*, 8 John. R. 432, 435. In this case of *Putnam v. Wyley*, the plaintiff let some cows and sheep for the term of one year, to be returned at the end of the year with their natural increase ; and the court held that the owner, the lessor, could not maintain trespass against a third person for the taking of the chattels pending the lease or bailment, not having either actual or constructive possession at the time. See ante, § 52. Constructive possession, or a right to immediate possession, is sufficient ; and the general owner or the party having a lien upon the chattels may maintain the action. *Neff v. Thompson*, 8 Barb. 213 ; ante, § 104. The principle asserted in *Putnam v. Wyley* is cited in *Concklin v. Havens* (12 John. R. 314) as applicable to the increase of a slave under a devise for life. The general owner holds the constructive possession of personal property. *Ash v. Putnam*, 1 Hill, 302, 306 ; *Cary v. Houtaling*, 1 Hill, 311, 314 ; *Smith v. Hill*, 22 Barb. 656. The contract is to be scrutinized and enforced according to its true meaning ; the plaintiff cannot maintain replevin for goods in the hands of a factor having a lien for advances. *Wood v. Orser*, 25 N. Y. 348.

⁴ *Jones on Bailm.* 86 ; *Hickok v. Buck*, 22 Vt. 149.

⁵ *Wood v. Ash*, *Owen*, 138 ; *Putnam v. Wyley*, 8 Johns. 432, 435.

⁶ *Hurd v. West*, 7 Cowen R. 752.

which the property in the thing reverts to the lessor.¹ In such a case, the bailor may take or recover back the article bailed as soon as the time of the bailment has expired; but till then his right of property or control over the property is suspended. But where the bailee is to return another article of the same kind, or has an option to return the same or another, the property passes; it is the case of a sale or exchange; the person making the transfer acquires a property in the price, and parts with his title or interest in the specific thing; on its return or redelivery it is regarded as a payment, not a reversion. And when a payment is to be made in specific articles, the title does not pass until the articles have been separated from others, set apart and actually delivered to the payee, or tendered to him.² If anything re-

¹ 7 Cowen R. 756, note a. In *Seymour v. Brown*, 10 Johns. R. 44, it was held that the title to wheat was not changed, where it was delivered on an agreement, that the person receiving it should for every five bushels of wheat deliver in exchange one barrel of flour; but that case is overruled. See *Norton v. Woodruff*, 2 Comst. R. 153; *Mallory v. Willis*, 4 N. Y. 76; *Smith v. Clark*, 21 Wend. 83. Where under a lease of cattle with a farm, the lessee is at liberty to return *cattle as good* at the end of his term, the title passes. *Carpenter v. Griffen*, 9 Paige's Ch. 310. And where goods are delivered to another person, to be sold and accounted for, or returned as good as when taken, the transaction amounts to a bailment; it is not a sale, though it authorizes a sale of the goods. *Morse v. Stone*, 5 Barb. 516. A delivery of material to be manufactured, or of logs to be sawed on shares, transfers a conditional interest—an interest arising and becoming perfect on the fulfillment of the contract by the bailee; and until the contract is fulfilled the bailor retains the title, and may maintain the action of trover. *Pierce v. Schenck*, 3 Hill, 28; *Sherman v. Way*, 56 Barb., 188. He may rescind the contract on reasonable terms, and take back the property. *Clark v. Marsiglia*, 1 Denio, 317; *Goodwin v. Kirker*, 2 Hilton, 401. When materials are delivered conditionally to be manufactured, the condition must be fulfilled before the title will pass. *Rightmyer v. Raymond*, 12 Wend. 51. And a condition subsequent, such as a condition in a lease of cattle and a span of horses, that the same shall be kept on a certain farm or place, will be enforced; the lessee by a removal of them forfeits his term. *Otis v. Wood*, 3 Wend. 498. Under a bailment or mortgage of personal property, we have seen that the interest of the bailee or mortgagee having a right to the possession for a definite time may be sold under an execution. *Hall v. Samson*, 19 How. Pr. 481; *i. e.*, where the contract gives a right of property, or something more than a mere lien. *Buskirk v. Cleveland*, 41 Barb. 610. A sale of chattels, for an agreed price, on a condition that the title shall remain in the seller till the price is paid, transfers no interest that can be sold on an execution against the purchaser till the price is paid. *Herring v. Hoppock*, 12 N. Y. 409. And the delivery of a flock of sheep, to be kept by the bailee for their wool, does not vest him with an interest that can be sold on execution until the shearing time. *Hasbrouck v. Bouton*, 60 Barb. 413. The bailee to manufacture and deliver on certain terms has, after performing his work, an interest in the property which is the subject of a levy and sale under an execution against him. *Weaver v. Darby*, 42 Barb. 411.

² *Barnes v. Graham*, 4 Cowen R. 452; *Slingerland v. Morse*, 8 John R. 477; Co. Litt. 210 b; *Foster v. Pettibone*, 7 N. Y. 433.

mains to be done, the delivery is not perfect, and the title does not pass.¹

§ 370. An executory sale conveys a chose in action, and an executed sale a chose in possession. In order to determine to which of these two classes a particular agreement belongs, it is a useful and decisive test to consider at whose risk the subject of the contract is left, under its provisions.² In a present sale, or in an exchange of property which amounts to a sale, the risk is with the purchaser after a delivery to him, and sometimes before ;³ after a delivery, where that is necessary to complete the contract.⁴ An agreement to exchange goods does not pass the title until at least a part of the goods have been delivered.⁵ In a bailment the risk of loss by fire, or from natural causes, remains with the bailor.⁶ In a sale it passes with the title; and where, under the contract, similar things of the same value and quality are to be returned in lieu of those received, the risk is with the person to whom the goods are delivered, and he must bear the loss where they are destroyed by wreck, pillage, fire, or other inevitable misfortune.⁷

§ 371. The hirer's special property for the term depends upon his fulfillment of the contract; and it ends where he does any act forfeiting his rights under the contract; as where he mortgages or sells the property,⁸ or does any act repudiating or cutting off the owner's title.⁹ He

¹ McDonald v. Hewett, 15 John. R. 349; Blossom v. Shotter, 59 Hun, 481; 128 N. Y. 679; Pierson v. Hoag, 47 Barb, 243. It is a general rule that upon the sale of chattels title does not pass so long as anything remains to be done by the seller before delivery to ascertain the identity, quantity or quality of the article sold, or to put it in the condition which the contract requires. See Terry v. Wheeler, 25 N. Y. 520, 525; Evans v. Harris, 19 Barb, 416; Burrows v. Whitaker, 71 N. Y. 291, 295. This rule has reference to the sale of articles to be separated from a larger quantity, and which must be identified before they are susceptible of delivery, and does not apply to a sale of specific property clearly ascertained. Where goods sold are clearly identified, and there remains nothing to be done except to weigh, measure or count them to ascertain the purchase price, the title passes. Groat v. Gile, 51 N. Y. 431; Sanger v. Waterbury, 116 N. Y. 371; Crofoot v. Bennett, 2 N. Y. 258; Kimberly v. Patchin, 19 N. Y. 330; Bradley v. Wheeler, 44 N. Y. 495.

² The reverse of the rule stated in the text is often affirmed; to wit, that the risk is with the party holding the title. McConihue v. N. Y. & Erie R. R. Co., 20 N. Y. 495.

³ Joyce v. Adams, 8 N. Y. 291; Burt v. Dutcher, 34 N. Y. 493; Bradley v. Wheeler, 44 N. Y. 495; Terry v. Wheeler, 25 N. Y. 520; Russell v. Carrington, 42 N. Y. 118; Burrows v. Whitaker, 71 N. Y. 291.

⁴ Field v. Moore, Hill & Denio, 418.

⁵ Chapin v. Potter, 1 Hilton, 366; Pierson v. Hoag, 47 Barb. 243.

⁶ Millon v. Salisbury, 13 John. R. 211.

⁷ Norton v. Woodruff, 2 N. Y. 153.

⁸ Sage v. Gile, 8 N. H. 325; Austin v. Dye, 46 N. Y. 500.

⁹ Fryatt v. The Sullivan Co., 5 Hill, 116; S. C. 7 Hill, 529.

holds under the contract of hiring, as a tenant holds under a lease; sometimes under the same instrument.¹ But the remedies on a termination of the lease are different; ² and the grounds on which the term is considered forfeited are not the same in respect to both kinds of property. Under a lease of real estate, the lessee has a right to assign the premises for the term; and all covenants or stipulations designed to limit or qualify the right, or to prevent his subletting the property, are construed strictly, so as to give the lessee, under any change of circumstances, the beneficial enjoyment of his estate or interest in the premises.³

§ 372. Where a chattel is hired for a term, of so many days, months or years, the hirer has an interest in the property for the time agreed upon; and he does not forfeit this interest by any natural and ordinary use of the chattel, though different from that contemplated by the owner.⁴ The essence of the contract must control; ⁵ if the hiring be general, and for a term, the hirer is entitled to the use of the property, and does not forfeit his right by a partial violation of the contract. The agreement resembles a lease of agricultural implements and live-stock, with a farm, for a fixed term; under which it would be unreasonable to treat the breach of a stipulation in respect to the mode of using the chattels as a forfeiture of one part of the contract, leaving the other in full force.⁶ And yet on a termination of the lease, where there is no express stipulation for a return of the chattels, the owner's remedy is the same as in the case of any other bailment; and it is agreed that a sale of the implements and stock by the tenant pending the term, or any attempt to sell them, determines the tenancy as to such property, and enables the owner to maintain an action for the things sold or for their conversion.⁷ The rent under leases of this kind is held to issue out of the land.⁸

Pending the lease or the contract of bailment, the owner has no present right of property in the chattels, or present right to the possession

¹ *Zule v. Zule*, 24 Wend. 76; *Van Hoozer v. Cory*, 34 Barb. 9.

² *Chamberlain v. Pratt*, 33 Y. Y. 47.

³ *Jackson v. Harrison*, 17 John. R. 66; *Roosevelt v. Hopkins*, 33 N. Y. 81; *Lynde v. Pough*, 27 Barb. 415; *Collins v. Hasbrook*, 46 N. Y. 157, 337. See 53 N. Y. 85.

⁴ *Lee v. Atkinson & Brook*, Yelv. 172; *Hartford v. Jackson*, 11 N. H. 145.

⁵ *Martin v. Farnsworth*, 49 N. Y. 555.

⁶ The contract covers both real and personal property. See *Mickle v. Miles*, 31 Penn. St. 20; *Newton v. Wilson*, 3 Hen. & M. 470.

⁷ *Zule v. Zule*, 24 Wend. 76; *Swift v. Mosely*, 10 Vt. 208; *Billings v. Tucker*, 6 Gray, 368; *Farrant v. Thompson*, 5 B. & A. 826.

⁸ *Fay v. Holloran*, 35 Barb. 295; *Marshall v. Mosely*, 21 N. Y. 280; *Sutliff v. Atwood*, 15 Ohio N. S. 186; 3 Denio, 284, 294; *Salmon v. Matthews*, 8 M. & W. 827.

of them.¹ He has only a reversionary interest;² and he must choose his remedy with a view to his legal rights.³

§ 373. The lessor or bailor of goods and chattels is bound to deal fairly with the bailee or lessee; his obligations are similar in some respects to those of a vendor of personal property. If a chattel be hired for a given purpose or for a specified use, the party letting it on hire impliedly engages that it is fit for the use or purpose named; this is clearly his engagement where for any reason the quality or fitness of the chattels for the use specified is not discernible by an ordinary observer. *E. g.*, the keeper of a livery-stable, engaged in the business of letting carriages and horses on hire, is bound to furnish a customer with a carriage and harness reasonably strong, safe and secure for the drive or the journey; and though not liable for defects that could not be discovered on a careful inspection, it is his duty to use all reasonable means to ascertain their true condition and keep them safe and secure. He is not bound absolutely for the structure and condition of the conveyance; and he is bound for the use of reasonable diligence, by prudent examination from time to time, to keep himself advised of the condition of his carriages, harnesses and horses.⁴ Failing in this duty, he is liable to his customer in damages, for injuries arising from discoverable defects.⁵ From the nature of his business, he is under an obligation to furnish a carriage or a horse fit and serviceable for the contemplated use or journey. Hence where a horse becomes disabled on the journey, without any fault on the part of the hirer, the owner

¹ Putman v. Wyley, 8 John. 432; Gordon v. Harper, 7 Term R. 9.

² Lacoste v. Pipkin, 13 Smedes & Marshall R. 589.

³ Sheldon v. Soper, 14 John. R. 352; 7 Cowen, 670, 680; Mears v. The London & S. Western R. R. Co., 11 Com. B. (N. S.) 854; Ely v. Ehle, 3 N. Y. 506.

⁴ He impliedly promises that a horse let by him is kind and suitable for the purpose for which he is let and is not vicious. Windle v. Jordan, 75 Me. 149; Kissam v. Jones, 56 Hun, 432; Horne v. Meakin, 115 Mass. 326.

⁵ Fowler v. Lock, L. R. 10 C. P. 90; 11 English R. 268; Hadley v. Cross, 34 Vt. 586. Plaintiff hired of the defendant, a livery-stable keeper, a horse, wagon and harness, to go on a journey with his wife, and while on the journey the spring to the snap on the thill to which the harness was attached, broke; and the horse became frightened and overthrew the wagon and injured the plaintiff's wife. On the trial the court instructed the jury that it was the defendant's duty to furnish the plaintiff with a carriage and harness reasonably strong, safe and secure for the journey; and that in his business it was his duty, by prudent examination from time to time, to keep them reasonably safe and secure; that if he should suffer them to go out without such examination it would be at his peril, should there be any defects capable of being discovered; and that the defendant was not liable for defects that could not be discovered on a careful inspection. The court refused to apply the rule holding the carrier of passengers liable for hidden defects in their coaches. Ingalls v. Bills, 9 Metc. 1.

is obliged to pay the expenses incurred to procure other means of returning, and for medicine, nourishment and care of the horse during his sickness; whether the horse recovers or dies of the malady.¹

§ 374. It is quite clear that the party letting goods or chattels on hire, with knowledge of their defective state, is liable in damages to the hirer, for injuries resulting from the use of them according to the contract.² And he is liable upon the principles applicable to a sale, accompanied by a fraudulent warranty,³ or to an order for goods to be supplied or manufactured for a given purpose.⁴ Upon principle a party letting a chattel for a specified use impliedly warrants that it is fit for that use,⁵ especially where the contract is made in the usual course of his business, or where the hirer has not the means of judging for himself in respect to its fitness. How far the hirer may recover for personal injuries sustained in the use of the property, depends upon the rule of damages; and while it is quite clear that no recovery can be had for remote or speculative damages, the hirer is entitled to the damages resulting directly and naturally from a breach of the contract.⁶

§ 375. Where the hired goods or chattels perish, pending the bailment, the consideration for the hire or recompense to be paid for their use terminates with their destruction; and the better opinion is that the rule holds good where the hiring is for the season or for a specified term.⁷ The use of the chattel being the consideration for the hire to be paid; the total loss of the property removes all possibility of deriving

¹ *Harrington v. Snyder*, 3 Barb. 380; *Leach v. French*, 69 Me. 296.

² *Horne v. Meakin*, 115 Mass. 326; *Kissam v. Jones*, 56 Hun, 432. A lender is thus liable, and much more the party letting goods on hire. *MacCarthy v. Young*, 6 Hurl. & Nor. Ex. 329; *Blackamore v. The Bristol R. Co.*, 8 Ellis & Black. 1035, 1050. But it has been held that a livery-stable keeper who has gratuitously furnished horses and carriages to take performers to a charitable entertainment and to bring them back, is not liable to a person, not a performer at the entertainment, injured by the running away of the horses after the performers with whom she had been riding had got out. *Siegrist v. Arnot*, 86 Mo. 200.

³ *Levy v. Langridge*, 4 Mees. & Wels. 337; the action was brought on the contract of sale of a gun, for the use of the plaintiff and his sons, with a warranty that it was made by a certain manufacturer, and was sound and safe; and it burst, injuring the plaintiff while he was using it. *S. P. Sharon v. Mosher*, 17 Barb. 518.

⁴ *Hoe v. Sanborn*, 21 N. Y. 552, and cases there cited. If the bailor fraudulently conceals the unsoundness of a chattel let on hire, the bailee may return it. *James v. Neal*, 3 T. B. Mon. (Ky.) 370; *Taylor v. Tillotson*, 16 Wend. 494, S. P.

⁵ *Cook v. N. Y. Floating Dry Dock Co.*, 1 Hilton, 436; *Barrett v. Manuf. Co.*, 1 Sweeny, 545; *Kissam v. Jones*, 56 Hun, 432.

⁶ *Williams v. Vanderbilt*, 28 N. Y. 217; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Griffin v. Colver*, 16 N. Y. 489; *Academy of Music v. Hackett*, 2 Hilton, 217.

⁷ *Muldrow v. Wilmington, etc.*, R. R., 13 Rich. (S. C.) 69; so held where a slave died during the term, and also where he became free. *Wilkes v. Hughes*, 37 Ga. 361.

an income from its use, unless the hirer assumes the risk of loss by the terms of his contract. Of itself a hiring does not cast the risk upon the hirer; hence the bailor cannot recover compensation for the use of personal property after it has been destroyed or rendered unfit for use. From the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the property.¹

§ 376. The use or service of personal property is sometimes hired where there is no actual bailment; as where the owner accompanies his chattels and works with them, or sends his servant charged with the custody and care of them.² The contract is special, and the owner is answerable for the conduct of the servant; as where a carriage and horses are hired at a livery-stable, and the owner sends his own driver with them. And the rule is the same where the coach belongs to the hirer, and the owner of the horses sends with them his own driver. The custody is not transferred; and the hirer does not stand in the relation of a bailee; the driver is not therefore to be regarded as his servant.³ The hirer may indeed become responsible to the full extent of a bailee, by making the driver his own servant or by assuming the actual management of the chattels.⁴

§ 377. No action can be based upon an illegal contract of bailment; but this rule does not prevent the bailor from recovering the goods after the bailment has expired.⁵

A contract, hiring carriages and horses for pleasure driving on Sunday, is illegal, and no compensation for their use can be recovered; no part of the contract can be enforced. But since the statute prohibiting labor or business on the Lord's day excepts from its operation works of necessity and charity, contracts of hiring made or services rendered on that day must be valid, when they come within the exception.⁶

¹ Taylor v. Caldwell, 113 Eng. C. R. 824. See also, *Dexter v. Norton*, 47 N. Y. 62; and *Carpenter v. Stevens*, 12 Wend. 589; and *Stewart v. Stone*, 127 N. Y. 500.

² *Carter v. Streator*, 4 Jones (N. C.), L. 62; *Hughes v. Boyer*, 9 Watts (Pa.), 556. In this case the owner sent his driver with horses hired for a journey.

³ *Laugher v. Pointer*, 5 Barn. & Cress. 437; *Quarman v. Burnett*, 6 Mees. & Wels. 499; *Samuel v. Wright*, 5 Esp. 263; *Dean v. Brauthwaite*, 5 Esp. 35.

⁴ *Murphy v. Kaufman*, 20 La. Ann. R. 559. In this case the hirer of teams for the transportation of goods prevailed on the drivers to go beyond the place agreed upon, and was held liable for their loss on the unauthorized trip.

⁵ *English v. McNair*, 34 Ala. 40. The bailor under a contract rendered void by the statute of frauds may also recover back the chattels after the bailment has expired, or where the bailee refuses to perform on his part. *Bartlett v. Wheeler*, 44 Barb. 162; *Jones v. Hay*, 52 Barb. 501.

⁶ *McClay v. Lowell*, 44 Vt. 116. Traveling on Sunday to visit one's children living away from home is within the exception, and so is traveling on Sunday to take a prisoner to jail under legal process. *Fisher v. Kyle*, 27 Mich. 454. And so also as to

Where the contract is void because illegal, no action can be based upon the contract; but it does not follow that the owner is without a remedy for the hirer's negligence or misconduct. He receives the property into his custody, and though the agreement be invalid, it confers a license to use the property for the purpose and to the degree specified; and so where the hirer engages a team to drive to a particular place, and he drives it to another place and in so doing injures the horses, he is guilty of misconduct; he has exceeded his license; he is liable for a conversion of the team, or for the damages sustained by the owner.¹ Without acquiring any rights under the contract, a party is entitled to protection against the tortious acts or negligent conduct of the other party; a common carrier, for example.²

§ 378. Under a hiring by an infant, the owner cannot enforce the contract; and he may enforce the legal duty to which the law binds him independent of the contract; in other words, infancy is a good defense to an action based upon the contract, and no defense to an action of tort.³ Hence where an infant hires a horse to go to a place agreed on, and goes beyond it or goes to another place in a different direction, he is liable in trover for an unlawful conversion of the property.⁴ He has a right to act under the contract, and while he does so the law covers him with its shield; but where he willfully repudiates and departs from the contract, or drives the horse with great violence and cruelty, he becomes a wrong-doer, a trespasser;⁵ and though not liable in any form

the transportation of passengers, mails and express freight or the carriage of cattle on Sunday. *Commonwealth v. Louisville, etc., R. R. Co.*, 80 Ky. 291; *Philadelphia, etc., R. R. Co. v. Lehman*, 56 Md. 209; or the hauling of dead-ripe fruit to market. *Wilkinson v. State*, 59 Ind. 416; or shoeing horses employed in transporting the mail. *Nelson v. State*, 25 Tex. App. 599.

¹ *Hall v. Corcoran*, 107 Mass. 251; *Nodine v. Doherty*, 46 Barb. 59; *Woodman v. Hubbard*, 5 Foster, 67; *Martin v. Gloster*, 46 Me. 420; *Stewart v. Davis*, 31 Ark. 518; *Frost v. Plumb*, 40 Conn. 111; contra, *Wheldon v. Chappel*, 8 R. I. 230; and *Gregg v. Wyman*, 4 Cush. 322.

² *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126. See *Sutton v. Town of Wauwatosa*, 29 Wis. 21; *Phila., Wil. & Balt. R. R. Co. v. Phila. & Havre de Grace Steam Tow boat Co.*, 23 U. S. 209; *Mohney v. Cook*, 26 Pa. St. 342; *Platz v. City of Cohoes*, 89 N. Y. 219.

³ *Bullock v. Babcock*, 3 Wend. 391; *Campbell v. Stakes*, 2 Wend. 137; *Vasse v. Smith*, 6 Cranch, 230; *Conway v. Reed*, 66 Mo. 346; *Morgan v. Cox*, 22 Mo. 374; *Ray v. Tubbs*, 50 Vt. 688; *Conklin v. Thompson*, 29 Barb. 218; *Peterson v. Haffner*, 59 Ind. 130; *Rodgers v. Lees*, 140 Pa. St. 475.

⁴ *Homer v. Thwing*, 3 Pick. R. 492; *Fish v. Ferris*, 5 Duer R. 49; *Towne v. Wiley*, 23 Vt. 350; *Freeman v. Boland*, 14 R. I. 39; *Lucas v. Trumbull*, 15 Gray, 307; *Green v. Sperry*, 16 Vt. 390.

⁵ *Campbell v. Stakes*, 2 Wend. 137; approved in argument in *Hartfield v. Roper*, 21 Wend. 615, 620; *Vasse v. Smith*, 6 Cranch, 226; *Green v. Greenbank*, 4 Eng. Com.

of action based upon the contract, he is liable in trespass or trover for his tortious act.¹ He disaffirms the contract by his wrongful act, and the owner becomes entitled to the immediate possession; after this his liability stands upon general principles.² The contract of hiring does not afford him any protection; he is in no better position than a party in possession under a license, limiting the use of the property.

§ 379. The engagements of a party taking a chattel on hire are to put the same to no other use than that for which it is hired; to use it well; to take care of it; to restore it at the time appointed; to pay the compensation or hire; and in general to observe whatever is prescribed by the contract, or by law, or by custom.³ The hirer's contract is rarely reduced to writing, and it is seldom full and explicit. Being reduced to writing or into a form of express stipulations, it is to be enforced according to the true sense of the contract; and not necessarily in the literal sense.⁴ And where a part of the agreement is expressed in writing or in a telegram, following a verbal negotiation, for a specific use of the property, the oral as well as the written part of the contract is to be carried into effect; and where taken together the stipulations by the bailor limit the use to be made of the property, the hirer is liable for any loss or injury befalling the same, while it is appropriated to a different use.⁵ The oral negotiations become merged in the written agreement when that covers the same subject matter;⁶ and not when

Law, 375. To render an infant who has hired a horse liable in an action for trespass, it must appear that he has done some willful and positive act amounting to an election on his part to disaffirm the contract. A bare neglect to protect the animal from injury and to return it at the time agreed upon is not sufficient. If it appears that he willfully and intentionally injured the animal, the action will lie; but not if the injury complained of occurred in the act of driving through the infant's unskillfulness, want of knowledge, discretion or judgment. Mere proof of death of the horse from over-driving will not support the action. *Moore v. Eastman*, 1 Hun, 578; *Jennings v. Rundall*, 8 Term R. 335; *Campbell v. Stakes*, 2 Wend. 137; *Eaton v. Hill*, 50 N. H. 235.

¹ An action on the case is not the proper remedy. 2 Wend. 137; 8 N. Y. 430, 441.

² *Tift v. Tift*, 4 Denio, 175; *Wallace v. Morss*, 5 Hill, 391. The infant's right of control over the property is no greater than that of an adult; and an adult must have authority for what he does with the property of another. *Anderson v. Nichols*, 5 Bosw. 121; S. C. 23 N. Y. 600.

³ *Harrington v. Snyder*, 3 Barb. 380; 2 Kent's Comm. 586, 587. See *New York v. Mabie*, 2 Duer, 401; 44 Barb. 472.

⁴ *McEvers v. Steamboat Sangamon*, 22 Mo. 187; in this case the barge hired was destroyed by irresistible force, viz., ice in the river, and the bailee's promise to return the barge in good order was held discharged.

⁵ *Beach v. Raritan & Del. Bay R. R. Co.*, 37 N. Y. 457; *Buchanan v. Smith*, 10 Hun, 474; *Malone v. Robinson*, 77 Ga. 719; *Stewart v. Davis*, 31 Ark. 518; *Fox v. Young*, 22 Mo. App. 386; *Kennedy v. Ashcraft*, 4 Bush (Ky.), 530.

⁶ *Renard v. Sampson*, 12 N. Y. 561; *Wilson v. Deen*, 74 N. Y. 531; *Long v. New*

the writing does not on its face purport to be a complete contract;¹ or when it is made in part execution of a prior parol contract.²

§ 380. The bailee may bind himself by an express contract for the absolute return of the property in as good condition as it was when he received it. He may assume a greater obligation than the law would impose upon him under the circumstances; that is to say, the law will enforce against him the very terms of his contract, in their fair meaning.³ A promise to return a hired chattel within a given time is not a special contract to insure its safety;⁴ and under a hiring of hotel furniture for a year, a stipulation by the lessee to surrender the property in as good condition as reasonable use and wear thereof will permit does not bind the lessee to insure the property against loss by fire.⁵ Under promises like these the bailee assumes no new obligation; it is not the intention of the parties that he should. He is not therefore liable for a loss or injury to the property without his fault.⁶

§ 381. The hirer of chattels for use is bound to confine himself to the use for which he stipulates. The contract regulates the rights of the parties; if the hiring be general, the hirer has the use of the chattels for such purposes as they are fitted by nature, and he is responsible only for ordinary neglect.⁷ If the hiring be for a specified time, the hirer acquires an exclusive right to the use of the things hired during the term agreed upon.⁸ If on the contrary there be no time specified in the contract, and only a general agreement to pay a fixed sum by the year for the use, the bailment may be terminated at the option of the bailor.⁹ And in both these cases, the contract being general, the hirer is entitled to use the property in the ordinary manner; that being the implied agreement between the parties.¹⁰

When a chattel is hired for a definite purpose, or for use in a particu-

York Cent. R. R. Co., 50 N. Y. 76; *Herman v. Roberts*, 119 N. Y. 37; *Stewart v. Babbs*, 120 Ind. 568; *Pegues v. Haden*, 76 Texas, 94; *Tracy v. Union Iron Works*, 29 Mo. App. 342.

¹ *Potter v. Hopkins*, 25 Wend. 417; *Jeffery v. Walton*, 1 Stak. B. 267.

² *McCulloch v. Girard*, 4 Wash. C. C. R. 289; *Blossom v. Griffin*, 13 N. Y. 569.

³ *Harmony v. Bingham*, 12 N. Y. 99; *Harvey v. Murray*, 136 Mass. 377.

⁴ *Field v. Brackett*, 56 Maine, 121; bailee held not liable for a loss by theft.

⁵ *Hyland v. Paul*, 33 Barb. N. Y. S. R. 241; bailee held not liable for a loss by fire.

⁶ *Millon v. Salisbury*, 13 John. R. 211; *Vaughan v. Webster*, 5 Harr. (Del.) 256; *Whitehead v. Vanderbilt*, 10 Daly, 214.

⁷ *Angus v. Dickerson*, 1 Meigs R. 459.

⁸ *Hartford v. Jackson*, 11 N. H. 145; *Putnam v. Wyley*, 8 John. R. 432; *Hickok v. Buck*, 22 Vt. 149.

⁹ *Drake v. Redington*, 9 N. H. 243. The rule is the same under a gratuitous loan for an indefinite time. *Orser v. Storms*, 9 Cow. R. 687.

¹⁰ *Harrington v. Snyder*, 3 Barb. 380; *McNeills v. Brooks*, 1 Yerg. (Tenn.) 75.

lar manner, as where a horse is hired to ride or drive a certain distance or to a particular place, the hirer is guilty of a conversion where he goes farther, or uses the chattel in a way not authorized by the contract.¹ And in such unauthorized use of the property the hirer is liable for all injuries and losses; at all events, he cannot excuse his failure to return the property, by showing that it was lost while in use by him contrary to the terms of the contract.² He is thought to be liable for all injuries and losses after such unlicensed use of the property, because without authority he brings it within the operation of destructive agencies;³ and there can be no doubt of his liability on the ground that his use of the property in violation of the agreement is itself an act of conversion.⁴

Where the chattel is used in violation of the contract, the bailor, by receiving payment for the unauthorized use, ratifies the act, and cannot afterwards maintain the action of trover.⁵ But he does not waive his cause of action by taking back the property;⁶ nor is he left without a remedy, where the property has been wrongfully or negligently injured by the bailee, and he receives the usual hire from him on its return.

§ 382. The use to be made of a hired chattel is sometimes limited by the nature of the property. Thus, one who hires a saddle-horse has no right to use him in a cart, or to carry loads as a beast of burden; and one who hires a vehicle constructed for the accommodation of two persons is not at liberty to overload it with a greater number.⁷ On the same principle, the right to use a chattel terminates on its becoming unfit for further service; as where a hired horse becomes sick or lame on a journey. The mode of feeding and watering the animal, and the manner of driving him, are also prescribed by the nature of the chattel; so clearly that the hirer impliedly engages to feed, water and drive the animal with reasonable skill, prudence and discretion.⁸

¹ *Rotch v. Hawes*, 12 Pick. R. 136; *Mayor of Columbus v. Howard*, 6 Ga. 213; *Homer v. Thwing*, 3 Pick. 492; *Lewis v. McAfee*, 32 Ga. 465; 5 Mass. 104; *Fisher v. Kyle*, 27 Mich. 454; *Ray v. Tubbs*, 50 Vt. 688; *Wentworth v. McDuffie*, 48 N. H. 402; *Buchanan v. Smith*, 10 Hun. 474; *Stewart v. Davis*, 31 Ark. 518; ante, §§ 377, 378.

² *Hooks v. Smith*, 18 Ala. 338; *Beach v. Raritan & Del. Bay R. R. Co.*, 37 N. Y. 457, 468; *Read v. Spaulding*, 5 Bosw. 395; 30 N. Y. 630.

³ *Read v. Spaulding*, 5 Bosw. 395; S. C. 30 N. Y. 630; *Harvey v. Epes*, 12 Gratt. 153.

⁴ *Collins v. Bennett*, 46 N. Y. 490; *Lucas v. Trumbull*, 15 Gray, 306.

⁵ *Rotch v. Hawes*, 12 Pick. R. 136; *Stewart v. Drake*, 46 N. Y. 449.

⁶ *Reynolds v. Shuler*, 5 Cowen, 323; *Livermore v. Northrup*, 44 N. Y. 107; *Austin v. Miller*, 74 N. C. 274.

⁷ *Harrington v. Snyder*, 3 Barb. 380; *Thompson v. Harlow*, 31 Ga. 348.

⁸ *Mooser v. Larry*, 15 Gray (Mass.), 451; *Eastman v. Sanborn*, 3 Allen (Mass.), 594; *Mayor of Columbus v. Howard*, 6 Ga. 213; *Wheelock v. Wheelwright*, 5 Mass. 104; *Thompson v. Harlow*, 31 Ga. 348.

§ 383. The purpose for which goods or chattels are hired may or may not enter into the contract ; if it appears from the circumstances, or from the language of the parties, that the hiring was intended for a given purpose, it is to be considered as a part of the contract. On the other hand, an incidental mention of the purpose for which a chattel is hired, or of the place where it is to be used, will not become an essential condition of the contract.¹ In short, the substance of the contract confers and limits the right to use the property, and is to be ascertained as a matter of fact. Under a general hiring, the bailee acquires the right to use the chattel generally, or for any ordinary purpose ; but he does not acquire the right to send it upon a dangerous voyage ; especially where, by the general custom, property thus employed is expressly hired for that purpose, and paid for proportionately on account of the increased risk.²

Under a contract of hiring for a term, the breach of a stipulation by the bailee in respect to the place where a chattel is to be used, without injuring or attempting to injure or impair the reversionary interest of the bailor, does not determine the bailment, and is not therefore a conversion.³ The act does not repudiate the right or title of the bailor ; and it is well settled that a mere removal of a chattel without right does not amount to a conversion unless the taking or detention is with intent to convert it, or has the effect to change or destroy the chattel.⁴ The removal or the misuser renders the bailee liable for any injury or loss arising from his unauthorized act.

§ 384. The hirer's duty to take care of the chattels and use them well is usually implied by law ; it is seldom the subject of an express agreement. Under the rule as implied by law, the hirer must exercise the same degree of care and diligence which all prudent men, that is, the generality of mankind, use, in keeping their own goods ;⁵ and this rule

¹ *Harvey v. Epes*, 12 Gratt. 153, 176, 183. This case holds that the use of chattels (slaves) in a different place from that specified in the contract of hiring is not of itself a conversion ; but is sufficient to cast on the hirer the burden of proving that they did not fall sick and die in consequence of this employment in a different place.

² *Spencer v. Pitcher*, 8 Leigh R. 565.

³ *Harvey v. Epes*, *supra*.

⁴ *Foulder v. Willoughby*, 8 Mees. & Wels. 540 : trover for a span of horses put off a ferry-boat, for the plaintiff's misconduct. See *Eldridge v. Adams*, 54 Barb. 417. See on the point of conversion : *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492 ; *Moore v. McKibbin*, 33 Barb. 246 ; *King ads. Geil*, 4 N. Y. Leg. Obs. 343. *Supra*, §§ 372, 381 ; care to be used by bailee, a drover of cattle. *Maynard v. Buck*, 100 Mass. 40.

⁵ *Chamberlain v. Cobb*, 32 Iowa, 161. If the hirer of a horse exercises such care and discretion in its use, he fulfills the requirements of the law and will not be liable for injuries from sickness. *Buis v. Cook*, 60 Mo. 391. But if the horse falls sick on

is interpreted with some reference to the circumstances and the nature of the property. A man who hires a horse is bound for the use of reasonable care and skill in feeding and watering him;¹ and in driving him;² and in keeping or harnessing him at an inn.³ And he is liable for the direct and natural damages resulting from his failure to exercise such care and skill, or from the failure of his servants.⁴

The hirer may in some instances render himself liable, even where he acts in good faith and to the best of his ability; as where he undertakes to prescribe for a hired horse, taken ill on a journey, and from want of skill gives him a medicine that causes his death. He is not answerable for results where he calls in a farrier.⁵

§ 385. The time for which chattels are hired, and the use to which they are to be applied, will generally indicate the understanding of the parties in respect to expenses and ordinary repairs. On this point the provisions of the civil code are quite specific and minute;⁶ while under the common law, the liabilities of a bailee in this particular do not appear to be very accurately defined.⁷ When horses or other domestic animals are hired, for a journey, or for a length of time, the natural inference is that the hirer assumes the ordinary expenses of feeding and keeping them in good condition.⁸ A like inference can hardly be made under a hiring of inanimate chattels, so as to charge the hirer with the expenses of keeping them in repair. And it is quite well settled, that the hirer of horses, cattle, or carriages is not liable for unusual and extraordinary expenses, that become necessary for the use or the preservation of the property; as where a horse falls lame or sick on a journey, or where a carriage is broken down, or where a barge is sunken or crushed by the ice, without any fault on the part of the hirer.⁹

the journey, and he continues to drive him to the end of the journey with notice of the fact, he will be liable for the value of the horse in case of its death. *Thompson v. Harlow*, 31 Ga. 348; *Bray v. Mayne*, Gow. 1; 5 Eng. C. L. R. 437.

¹ *Eastman v. Sanborn*, 3 Allen, 594.

² *Mooers v. Larry*, 15 Gray, 451, *Graves v. Moses*, 13 Minn., 335.

³ *Hall v. Warner*, 60 Barb. 198.

⁴ *Sinclair v. Pearson*, 7 N. H. 219, and the four last above cited cases; *Thompson v. Harlow*, 31 Ga. 348.

⁵ *Dean v. Keete*, 3 Campb. R. 4.

⁶ Code of La. Arts. 2646, 2662, 2664, 2665.

⁷ 2 Kent's Comm. 586.

⁸ The duty of keeping hired horses in a good and serviceable condition may very well oblige the hirer to keep them properly shod.

⁹ *Millon v. Salisbury*, 13 John. R. 211; *McEvers v. Steamboat Sangamon*, 22 Mo. 187; *Leach v. French*, 69 Me. 389; *Harrington v. Snyder*, 3 Barb. 380; *Reading v. Menham*, 1 Mood. & Rob. 234. This case holds that under an agreement by the owner to keep a carriage hired by the year in repair, he is bound to repair where the carriage is injured by any cause except the hirer's willful default.

Under the late system of slavery, the hirer was held bound to treat the slave with a due consideration of his wants; and the law implied an agreement on the part of the hirer to furnish him with suitable food and shelter; but it did not require the hirer to pay for medical services and attendance upon him in sickness.¹

§ 386. There are cases where the bailee has not himself been guilty of any negligence and yet has a right of action for an injury to the property against a third person; and in these cases the owner should recover against the hirer the amount recovered by him against the third person. There can be little doubt that the owner's recovery should thus be made commensurate with that of his bailee, *after* a recovery by the latter against the third party. Deducting expenses, the bailee under these circumstances recovers and receives the damages in trust for the owner.²

§ 387. Under a delivery of goods upon a double or conditional contract of hire or sale, the receiver is regarded as a bailee for most purposes: *e. g.*, where a man receives goods upon a contract, by which he is to keep them a certain period and to become the owner if he pays for them within that time, and otherwise is to pay for the use of them; he receives them as a bailee in this sense, that the property in them is not changed till the price is paid; and if the bailee in the mean time assume to sell them the bailment is ended, and the owner may demand and recover the goods.³ The contract is not allowed to operate beyond the intention of the parties; and the receiver of the goods under the agreement is not regarded as a bailee, so that a recovery by him against a trespasser for taking and converting the property will bar a second action by the

¹ The custom of hiring slaves by the week or by the season entered into the contract; and the hirer assumed the expenses of supplying them with suitable food, as in the ordinary hire of hands upon a farm, without undertaking for their proper treatment in case of sickness. *Sims v. King*, 18 Ala. R. 236; *Leach v. West*, 16 Ala. 250; *Isbel v. Nowell*, 4 Gratt. 176; 10 *Humph. R.* 267.

² See *Bliss v. Schaub*, 48 Barb. 339, 342; and *Kellogg v. Sweeney*, 1 Lansing R. 397; S. C. 46 N. Y. 291. In *Brewster v. Warner*, 136 Mass. 57, it was held that where the bailee of a wagon, which was injured while in his possession by the negligence of a third person, has requested the owner to have the wagon repaired and the expenses charged to him, he may recover of the wrong over the damage sustained without having paid the expense of the repairs.

³ *Sargent v. Gile*, 8 N. Hamp. R. 325; *Herring v. Hoppock*, 15 N. Y. 409; *Strong v. Taylor*, 2 Hill R. 326; *Barnett v. Pritchard*, 2 Pick. 512; *Fairbanks v. Phelps*, 22 Pick. 535; *Dresser Manuf. Co. v. Waterston*, 3 Metc. 9; *Herring v. Willard*, 2 Sandf. R. 418; *Ballard v. Burgett*, 40 N. Y. 314; *Carter v. Kingsman*, 103 Mass. 517. *Ante*, § 349; *Harkness v. Russell*, 118 U. S. 663; *Foreman v. Drake*, 98 N. C. 311; *Andrews v. Richmond*, 34 Hun, 20.

vendor. The transaction does not unite the interests of the parties like a simple bailment.¹

An honest purchaser from the party in possession is not liable to an action until he has had an opportunity to restore the property to the true owner.² Purchasing with notice of the defect in the title, he can hardly insist upon the formality of a demand before suit.³ Mere possession for a special purpose, though following an agreement for the property, does not enable a man to transfer the title.⁴ And there can be no title to goods gained through a felony.⁵

§ 388. Under a bailment of goods by joint owners or by tenants in common, the contract must be fulfilled with a due regard to the relation subsisting between the bailors; ⁶ and they are jointly liable on the contract. Where two or more persons jointly hire goods or chattels for use, they are jointly liable on the contract; ⁷ and where one person hires a horse which is delivered on his request to another, and by him driven to death, the hirer driving another horse in company with him, both may be held jointly liable for the injury.⁸ Indeed, the rule is general that where an act is done by the co-operation of several persons, causing an immediate injury, all may be held jointly liable; both when the act may be characterized as a direct trespass, and when it is the result of negligence by all, working a direct injury.⁹ Some concert of action, or at least co-operation, is necessary to maintain the action of trespass against parties sued as joint trespassers.¹⁰ Concurrence without concert of action in an act of negligence renders the parties liable jointly and severally for the injury.¹¹

¹ Hasbrouck v. Lounsbury, 26 N. Y. 598; Smith v. James, 7 Cow. 328, note 300; 12 N. Y. 343.

² Millspaugh v. Mitchell, 8 Barb. 333; Barrett v. Warren, 3 Hill R. 348; Gillett v. Roberts, 57 N. Y. 28.

³ Wooster v. Sherwood, 25 N. Y. 278.

⁴ Bassett v. Spofford, 45 N. Y. 387.

⁵ Brower v. Peabody, 13 N. Y. 121.

⁶ Ante, § 56; Davis v. Lottich, 46 N. Y. 393; Beecher v. Bennett, 11 Barb. 374.

⁷ O'Brien v. Bround, 2 Spears (S. C.), 495.

⁸ Banfield v. Whipple, 10 Allen (Mass.), 27.

⁹ Bishop v. Ely, 9 John. R. 294; Guille v. Swan, 19 John. R. 381; Losee v. Buchanan, 61 Barb. 88; S. C. 51 N. Y. 476; Colegrove v. Harlem & New Haven R. R. Cos., 6 Duer, 382, 402; S. C. 20 N. Y. 492. See Williams v. Sheldon, 10 Wend. 654, as to requisite concert to justify an action of trespass against several persons as joint trespassers.

¹⁰ Obzen v. Schirenburg, 3 Daly, 100. The injured party may sue one or all for an act of tort. Low v. Mumford, 14 John. R. 426.

¹¹ Barrett v. The Third Ave. R. R. Co., 45 N. Y. 628; Klander v. McGrath, 35 Penn. St. 128; Hawkesworth v. Thompson, 98 Mass. 77; Pfau v. Williamson, 63 Ill. 16, holds contractor liable to employer.

A joint action cannot be maintained against a master and servant for a willful injury done by the latter in driving his master's carriage in his absence; and the current of authority allows the action against both for an injury caused by the servant's negligence, in the master's absence, in driving his team or in the prosecution of his business;¹ and the rule has been applied so as to hold a corporation and its servants and agents jointly and severally liable for injuries caused by their negligence in the conduct of its business.²

§ 389. *Liability in respect to Servants.* Under the common law every man is responsible for injuries occasioned by his own personal negligence, and for the negligence of those whom the law denominates his servants, while engaged in the business or work for which he employs them.³ The general rule is now well settled that the master is liable for all the acts of his servant which are within the general scope of his employment, and which are done while engaged in his master's business, and with a view to the furtherance of that business and the master's interests, whether such acts are done negligently, wantonly or even willfully. But if the servant goes outside of his employment and, without regard to his service, acting with malice or in order to effect some purpose of his own, wantonly causes damage to another, the master is not liable.⁴ This is all that is decided by the cases apparently holding that the master is not liable for the unauthorized malicious or willful act of his servant; or for his tortious act or illegal act exceeding his authority.⁵ He is answerable for the servant's misjudgment or error in fact,

¹ Wright v. Wilcox, 19 Wend. 343; Phelps v. Wait, 30 N. Y. 78; Losee v. Buchanan, 61 Barb. 86, 88. See Parsons v. Winchell, 5 Cush. 592.

² Losee v. Buchanan, supra. See 34 N. Y. 30; Suydam v. Moore, 8 Barb. 358; 13 N. Y. 42.

³ Sammel v. Wright, 5 Esp. 263; Dean v. Brauthwaite, 5 Esp. 35. The modern cases hold that a master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. Singer Manuf. Co. v. Rahn, 132 U. S. 518; Philadelphia & Reading R. R. Co. v. Derby, 56 U. S. 468, 486; Quinn v. Power, 87 N. Y. 535; Rounds v. Del., Lack. & West. R. R. Co., 64 N. Y. 129; Ochsenbein v. Shapley, 85 N. Y. 214; Cook v. Houston Direct Nav. Co., 76 Texas, 358; Stone v. Hills, 45 Conn. 44; Higgins v. Watervliet Turnp. Co., 46 N. Y. 23.

⁴ Mott v. Consumers' Ice Co., 73 N. Y. 543; Rounds v. Del., Lack. & West. R. R. Co., 64 N. Y. 129; Mars v. Del. & H. Canal Co., 54 Hun, 625; Peck v. New York Cent. & H. R. R. Co., 70 N. Y. 587; Cohen v. Dry Dock, etc., R. R. Co., 69 N. Y. 170; Poucher v. Blanchard, 86 N. Y. 256, 260.

⁵ See Fraser v. Freeman, 43 N. Y. 566; Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479; Isaacs v. Third Ave. R. R. Co., 47 N. Y. 122; Mali v. Lord, 39 N. Y. 381. The test of the master's responsibility for the act of his servant is not whether such

and wrongful act thereon, within the scope of his employment ;¹ for the servant's want of intelligence and his act of folly arising therefrom ;² and for the servant's failure in duty during his intoxication.³

The master's liability for the acts of his servant is placed upon these grounds : first, they are done on his behalf and are therefore his acts ; second, he employs or selects his servant with knowledge of his character, capacity and skill, and has the right to direct and control his conduct. The employer is the master, and must answer for the acts or misconduct of the subordinate within the line of his employment.⁴ The rule is perfectly plain and well settled ; and the only difficulty in its application is generally one of fact, namely this, to ascertain the true relation in which the parties stood to each other.⁵ The master must answer for his servant's negligence, and for the negligence of one who volunteers to assist him in his labors ;⁶ as where the servant driving his master's cart entrusts the reins to a stranger riding with him, and an injury results from his careless driving ;⁷ or where a servant directs another to do an act, within the scope of his employment, and he does it ; like setting fire in brush piled in heaps on a field ready for burning.⁸

§ 390. The master is not answerable to third parties for the negligence of a servant, while engaged in his own private business or acting beyond the range, course or scope of his employment ; as where a servant drives his master's horse and carriage or cart upon an errand or upon business of his own, without his master's knowledge or consent, and in doing so negligently runs upon or injures the carriage, horses or

act was done according to the master's instructions, but whether the act was done in the prosecution of the business that the servant was employed by the master to do. *Cosgrove v. Ogden*, 49 N. Y. 255 ; *Peck v. New York Cent. & H. R. R. Co.*, 70 N. Y. 587 ; *Lynch v. Metropolitan El. R. R. Co.*, 90 N. Y. 77, 86 ; *Ochsenbein v. Shapley*, 85 N. Y. 214, 220 ; *Clark v. Koehler*, 46 Hun, 536.

¹ *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23 ; *Townsend v. New York Cent. & H. R. R. Co.*, 56 N. Y. 295. The mistaken judgment for which the master is held liable must be exercised in the commission of an act within the servant's employment. *Molloy v. New York Cent., etc., R. R. Co.*, 10 Daly, 453.

² *Lannen v. The Albany Gas Light Co.*, 44 N. Y. 459.

³ *Chapman v. N. Y. C. R. R. Co.*, 33 N. Y. 369 ; *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44.

⁴ *Blake v. Ferris*, 5 N. Y. (1 Seld.) 48 ; *Quarman v. Burnett*, 6 Mees. & Wels. 497 ; *Rapson v. Cubitt*, 9 Mees. & Wels. 709 ; *Hobbitt v. Northwestern R. Co.*, 4 Wels. Hurlst. & Gordon, 254.

⁵ *Milligan v. Wedge*, 12 Adol. & Ellis. 737 ; *Rapson v. Cubitt*, *supra*.

⁶ *Althorp v. Wolfe*, 22 N. Y. 355 ; negligence in throwing snow and ice from a roof on a passer-by.

⁷ *Booth v. Wister*, 7 Carr. & Payne, 66.

⁸ *Simons v. Monier*, 29 Barb. 419.

person of a third party.¹ The master's liability does not rest upon the ground that he has entrusted the servant with the horse and carriage, but on the ground that the servant is acting for the master and within the course of his employment. Hence the master is liable for the negligent act of the servant, in the prosecution of the business entrusted to him, though done in violation of instructions relating to the manner of doing the work.² The duty of having the work done with proper skill and care includes the active direction of the work; and the master is in some cases liable precisely because of the agent's failure to follow out and fulfill his instructions with intelligence and discretion.³ He is so liable where his driver, with the intention of rendering him a benefit, drives his omnibus across the road, blocking the way of a rival line, and causing a collision; and his liability is not lessened by the fact that his servant had express instructions not to obstruct other omnibuses, and did not observe them.⁴

§ 391. The master is civilly liable for the unlawful act of his agent or servant, where the act belongs to a class which are expressly authorized under a given state of facts, and becomes unlawful only because of the existence of a fact which was unknown to the servant;⁵ as where a conductor ejected a passenger from a car, in good faith believing he had not, when in fact he had, paid his fare. The master, being a corporation, must answer for the act, the same as a natural person, in compensatory damages. It being the duty of the conductor to preserve order and protect his passengers from annoyance and injury, his principal is liable for his neglect of that duty, and for the manner in which he discharges it.⁶

¹ *Sheridan v. Charlick*, 4 Daly, 338; *Mitchell v. Crossweller*, 13 C. B. 237; *Story v. Ashton*, L. R. 4 Q. B. 476. See also, *McKennie v. McLeod*, 10 Bing. 385; and *Whitman v. Pearson*, L. R. 3 C. P. 422.

² *Cosgrove v. Ogden*, 49 N. Y. 255. This action was for negligence in piling lumber, the work being done under the direction of the defendant's foreman. See *Southwick v. Estes*, 7 Cush. 385; *Priester v. Angley*, 5 Rich. 44.

³ *Weed v. Panama R. Co.*, 17 N. Y. 362; *Cosgrove v. Ogden*, 49 N. Y. 255. A principal is liable for his agent's fraud in doing an authorized act. *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 14 N. Y. 623; 16 N. Y. 125.

⁴ *Bayley v. Manchester, S. & L. Ry. Co.*, Law Rep. 8 C. P. 153; *Limpus v. London Gen. Om. Co.*, 1 Hur. & C. 526; *Green v. The London General Om. Co.*, 7 Com. Bench (N. S.), 290.

⁵ *Hamilton v. Third Ave. Railroad Co.*, 53 N. Y. 25; *Goff v. Great Northern R. Co.*, 3 E. & E. 672; *Townsend v. N. Y. C. R. R. Co.*, 56 N. Y. 295; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

⁶ *Pittsburgh, F. W. & C. R. Co. v. Hinds*, 53 Penn. St. 512; *Flint v. Norwich & N. Y. Transp. Co.*, 34 Conn. 554; *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y. 108; *Higgins v. Watervliet T. Co.*, 46 N. Y. 23; *Goddard v. Grank Trunk Ry.*, 57 Me. 202; *Commonwealth v. Power*, 7 Metc. 596; *Nieto v. Clark*, 1 Cliff. 145;

The employer may be liable for an act of trespass by his servant ; as in cutting timber upon the land of an adjoining owner, when the work is done under the directions of the master or his authorized agent. The act is as truly his as if he cut the timber by his own hand.¹

§ 392. Under a hiring of the services or use of personal property where there is no bailment, the hirer does not assume the custody or care of the chattels, nor the place of master in their employment :² as where a person hires a carriage and horses at a livery-stable, and the owner sends with them his own driver, to take care of and drive the team. The owner here, and not hirer, stands in the relation of master, and must answer for the negligence or misconduct of the driver. The rule *respondeat superior* applies only to the immediate employer, and there cannot be two superiors answerable for the same servant.³

On the other hand, the hirer of wagons, or carriages and horses, receiving them into his custody to be used by him at his pleasure, becomes a bailee, and is in no sense a servant of the owner.⁴ He is responsible to the owner for the reasonable care of them, and to third persons for any negligence of his servants in the use of them.⁵ He is liable to third persons, to the same extent as if he were the actual owner of the vehicles and teams used by him.

§ 393. Carmen carrying on business on their own account do not stand in the relation of servants to merchants employing them to do their carting, at so much a load or at so much a package. The driver on the cart or truck is the servant of the truckman carrying on that branch of business, and not the servant of the merchant whose goods he is moving ; the merchant is not therefore liable for the negligence of

Stewart v. Brooklyn & Crosstown R. R. Co., 90 N. Y. 588; *Croaker v. Chicago & Northwestern Ry. Co.*, 36 Wis. 657; *Bryant v. Rich*, 106 Mass. 180; *Sherley v. Billings*, 8 Bush, 147; *Chicago, etc., R. R. Co. v. Flexman*, 103 Ill. 546. The ordinary rule of liability of a master for the wrongful act of a servant towards one to whom the master owes no duty does not apply to the act of a servant entrusted with the execution of a contract of a common carrier. *Stewart v. Brooklyn & Crosstown R. R. Co.*, 90 N. Y. 588.

¹ *Smith v. Webster*, 23 Mich. 298.

² *Ante*, § 376; *Laugher v. Pointer*, 5 B. & C. 547; *Quarman v. Burnett*, 6 Mees. & Wels. 508.

³ *Boniface v. Relyea*, 6 Robt. R. 397. An undertaker who hires carriages to attend a funeral is not liable as master for the negligence of one of the drivers.

⁴ *Powels v. Hudson*, 36 Eng. L. & E. Rep. 162.

⁵ *Weyant v. N. Y. & Harlem R. Co.*, 3 Duer, 360; 6 M. & W. 697; 9 M. & W. 709; *Schular v. Hudson River R. R. Co.*, 38 Barb. 653; *Wolfe v. Mersereau*, 4 Duer, 473; *Coulter v. American M. U. Ex. Co.*, 5 Lansing, 67. If the hirer of a horse by his carelessness allows it to run away to its injury, he is liable to an action. *West v. Blackshear*, 20 Fla. 457.

the driver on the truck.¹ The rule is the same where the truckman is employed one day in each week to deliver provisions sold to customers at retail.²

A contractor engaging to do an entire job of work is liable as a master for the negligence of those employed by him in its performance.³ If he engages to furnish materials, and construct or repair a building, he is liable for the negligence of those acting under him as laborers or servants;⁴ and he is not liable for the negligence of those employed by and acting under the directions of a sub-contractor for the whole or for a portion of the work; as where the contractor engages to find materials, and construct and finish a building, and then contracts with a mason to do the mason work, or with a plumber to do the plumbing, or with a painter to do the painting.⁵ The owner of the premises is not liable for negligence in the manner of doing the work, under the contract; and yet where the work or act done under the contract is illegal and wrongful, he is liable to a third person who sustains damages from the doing of that wrong.⁶

§ 394. A general or continuous employment is not necessary to create the relation of master and servant. An employment for one occasion, or for a single purpose, will suffice.⁷ And the fact that a person in charge of a horse and riding him with the assent of the owner, and

¹ McMullen v. Hoyt, 2 Daly, 271; Deforest v. Wright, 2 Mich. 368; Overton v. Freeman, 8 Eng. Law & Eq. 479; 11 C. B. 867; Martin v. Temperly, 4 Q. B. 298; Butler v. Hunter, 7 Hurlst. & Nor. 826.

² Wood v. Cobb, 13 Allen, 58. Here the rule was applied where the truckman, being sick, got the defendants' servant, with their assent, to drive one team and assist him in delivering fish, and in so doing the servant drove against the plaintiff.

³ Blake v. Ferris, 5 N. Y. (1 Seld.) 48; Pack v. Mayor, etc., of N. Y., 8 N. Y. (4 Seld.) 222; Hexamer v. Webb, 101 N. Y. 377, 385; Kelly v. Mayor, etc., of N. Y., 11 N. Y. 432; Schular v. Harlem River R. R. Co., 38 Barb. 653.

⁴ Hilliard v. Richardson, 3 Gray (Mass.), 349; Brown v. Lent, 20 Vt. 529; Forsyth v. Hooper, 11 Allen, 419; Coomes v. Houghton, 102 Mass. 211.

⁵ Rapson v. Cubitt, 9 Mees. & Wels. 710; Hilliard v. Richardson, 3 Gray, 349; King v. N. Y. C. & H. R. R. Co., 66 N. Y. 181, 185.

⁶ Ellis v. Sheffield Gas Consumers' Co., 2 Ellis & Bl. 767. The owner is liable as master, where he employs a man to clean out a drain, and pays him therefor a certain sum. Sadler v. Hemlock, 4 Ellis & Black. 570.

⁷ Forsyth v. Hooper, 11 Allen (Mass.), 419. The decision in this case proceeds on the ground that the party doing a job of work, *i. e.*, hoisting a chime of bells, under a contract, stands in the relation of master to those employed in the work. The relation of master and servant exists where the employer selects the workman, may remove or discharge him for misconduct, and may order not only what work shall be done, but also the mode and manner of performance. Blake v. Ferris, 5 N. Y. 48; Town of Pierrepont v. Loveless, 72 N. Y. 214, 215; Butler v. Townsend, 126 N. Y. 105, 109; Hexamer v. Webb, 101 N. Y. 377, 383, 384; Ham v. Mayor, 70 N. Y. 459, 461.

engaged in his business, is in the general employment of a third party, does not exempt the owner from liability for an injury caused by negligence in thus riding the horse.¹ The party at whose instance a service is rendered or the work done is liable; because he is the employer, and so responsible for the conduct and management of the business.² And the rule is not affected by the circumstance that the servant uses the machinery of a third party and calls in the aid of a bystander; as in the lowering of a box from the loft of a store, with the aid of a tackle and fall.³

It is not necessary that the servant should be employed by the master in person, or that he should be under his immediate and personal superintendence, in order to render him liable for injuries caused by the servant's neglect. The owners of a ship are responsible for goods spoiled through the default of the master of the ship, employed by them;⁴ and a warehouseman is answerable for the acts of a master porter appointed by him and engaged in lowering goods out of his warehouse;⁵ and also for the manner in which the goods are piled as they are received, under his direction.⁶ And a party not pecuniarily interested in a transaction is liable as a master where he provides the men to do a given work, to the exclusion of others; as in unloading vessels at a dock.⁷

§ 395. An employer is not liable to one of his agents or servants for an injury which he sustains in consequence of the misfeasance or negligence of another agent or servant, where both are engaged in the same general business or employment; a rule which rests upon the ground that each employee on entering the service takes upon himself the ordinary risks and dangers attending it, including the negligence of his fellow-servants.⁸ The rule applies to the different grades of employees,

¹ *Kimball v. Cushman*, 103 Mass. 194; *Goodman v. Kennell*, 1 M. & P. 241; 3 C. & P. 167.

² *Coomes v. Houghton*, 102 Mass. 211. In this case a contractor employed to construct the walls of a building was held not liable for the negligent act of a laborer who was induced by the owner of the property to go to work upon them, though the contractor accounted with and paid the laborer for his work.

³ *Stevens v. Armstrong*, 6 N. Y. (2 Seld.) 435. See *Johnson v. Netherlands American Steam Nav. Co.*, 132 N. Y. 576; *Sanford v. Standard Oil Co.*, 118 N. Y. 571.

⁴ *Boson v. Sanford*, 2 Salk. R. 440; *Annett v. Foster*, 1 Daly, 502.

⁵ *Randleson v. Murray*, 8 Adolph. & Ellis, 109; *Thomas v. Day*, 4 Esp. 262; ante, § 343.

⁶ *Murphy v. Coralli*, 10 Jur. N. S. 1207; 34 L. J. Exch. 14; 13 W. R. 165; 3 H. & C. 462.

⁷ *Gibson v. Inglis*, 4 Campb. 72.

⁸ *Coon v. Syracuse & Utica R. R. Co.*, 5 N. Y. (1 Seld.) 492; *Farwell v. B. & W. R. R. Co.*, 4 Met. 40; *Priestly v. Fowler*, 3 Mees. & Wels. 1; *Wright v. N. Y. C. R.*

where some are subject to the direction and control of others, or are engaged in different kinds of work, all tending to accomplish the same general purpose.¹ The rule does not apply so as to relieve the employer from liability for his own negligence; as in continuing to use a defective and dangerous engine, with notice of its condition;² or in continuing to use a dangerous structure or machinery with knowledge of its defects;³ or in the employment of incompetent or dissipated servants or agents.⁴ The employer is bound for the use of reasonable care and discretion in the prosecution of his business, including all its separate parts; and the agent or servant cannot recover where he has been guilty of contributory negligence.⁵

§ 396. Acts of nonfeasance by a servant do not bind the principal; the servant's refusal to deliver a chattel on the demand of a stranger is no evidence of a conversion by his master:⁶ but the servant's refusal under the command of his master is a conversion by the latter.⁷ Non-

R. Co., 25 N. Y. 562; *Sherman v. Rochester & Syracuse R. R. Co.*, 17 N. Y. 153, 156; *Slater v. Jewett*, 85 N. Y. 61; *Hogan v. Smith*, 125 N. Y. 774; *Arnold v. Del. & Hud. Canal Co.*, 125 N. Y. 15; *Cullen v. Norton*, 126 N. Y. 1; *Hussey v. Coger*, 112 N. Y. 614. Two persons cannot be fellow-servants unless they are under the control of one master. *Kilroy v. Del. & Hud. Canal Co.*, 121 N. Y. 22; *Sullivan v. Tioga R. R. Co.*, 44 Hun, 304; 112 N. Y. 643; *Sanford v. Standard Oil Co.*, 118 N. Y. 571.

¹ *Russell v. Hudson R. R. Co.*, 17 N. Y. 134, 153; *Boldt v. N. Y. C. R. R. Co.*, 18 N. Y. 432; *Butler v. Townsend*, 126 N. Y. 105, 111; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171; *Crispin v. Babbitt*, 81 N. Y. 516; *Loughlin v. State of N. Y.*, 105 N. Y. 159; *Slater v. Jewett*, 85 N. Y. 61.

² *Keegan v. Western R. R. Co.*, 8 N. Y. (4 Seld.) 175; *Kunz v. Stuart*, 1 Daly, 431; *Cone v. Delaware, L. & W. R. R. Co.*, 81 N. Y. 206; *Ellis v. New York, L. E. & W. R. R. Co.*, 95 N. Y. 546.

³ *Ryan v. Fowler*, 24 N. Y. 410; *Ormond v. Holland*, 96 Eng. Com. Law R., 100; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; *Stringham v. Stewart*, 100 N. Y. 516.

⁴ *Wright v. N. Y. C. R. Co.*, 25 N. Y. 562; master's duty in employing servants or agents; *Lanning v. N. Y. C. R. Co.*, 49 N. Y. 521; *Claghorne v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 44; *Coppins v. New York Cent. & H. R. R. Co.*, 122 N. Y. 557; *Whittaker v. Del. & Hud. Canal Co.*, 126 N. Y. 544. The rule that the servant takes the risks of the business is subject to the qualification that the master must exercise reasonable care to guard the servant while engaged in his duties from unnecessary hazards, including hazards from negligence of co-employees. *Abel v. Del. & Hud. Canal Co.*, 128 N. Y. 662; *Ford v. Lake Shore & M. S. Ry. Co.*, 124 N. Y. 193; *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368.

⁵ *Looman v. Brockway*, 3 Robt. 74; 39 N. Y. 468; *Spelman v. Fisher Iron Co.*, 56 Barb. 151; *Brown v. Maxwell*, 6 Hill, 592; *Fitzgerald v. New York Cent. & H. R. R. Co.*, 59 Hun, 225; *Ryan v. Long Island R. R. Co.*, 51 Hun, 608.

⁶ *Goodwin v. Wertheimer*, 99 N. Y. 149; *Carey v. Bright*, 58 Pa. St. 70; *Storm v. Livingston*, 6 Johns. R. 44.

⁷ *Shotwell v. Few*, 7 John. R. 302.

action by the servant on a demand by a stranger, for want of authority, is within the line of his duty; and a subsequent approval of his conduct in that particular will not render his principal liable as for a conversion;¹ nor will such a refusal render the servant liable for a conversion.² From the nature of his situation, the servant is entitled to some consideration; and it seems he is not obliged to assume the responsibility of deciding on a question of title. A bailee is less favored.³ And it is held that a conversion by an agent binds his principal, where he accepts and appropriates the benefits of the tortious act, with knowledge of all the facts.⁴

§ 397. The legal sense of some words is more limited and specific, and of others it is broader than the popular sense. A man who is hired by the year at a fixed salary, though of full age, holds the legal relation of a servant to his employer;⁵ and the relation is the same where the employee is to occupy a house to be furnished by his employer. The legal relation is the same as it is where the hiring is by the day, by the month or by the piece;⁶ the relation rests upon the contract;⁶ and there does not appear to be any distinction under the common law, as enforced in this country, between menial and other servants.

Under the Code of Louisiana there are three kinds of servants recognized: 1. Those who only hire out their service by the day, week, month or year, in consideration of certain wages. 2. Those who engage to serve for a fixed time for a certain consideration, and who are therefore considered not as having hired out, but as having sold their services. 3. Apprentices, that is, those who engage to serve any one, in order to learn some art, trade or profession. The first of these classes includes domestics, who receive wages and stay in the house of the person employing them, for his service or that of his family; such as valets, footmen, cooks, butlers and other house servants. These may leave their employer without assigning any reason, and they may be dismissed in the same arbitrary manner.⁷ Other employees are placed upon a different footing, and their relation to their principal is purely one of contract.⁸ As with us, masters and employers are answerable

¹ *Mount v. Derick*, 5 Hill, 455.

² *Mires v. Solebay*, 2 Mod. 242; *Alexander v. Southey*, 5 Barn. & Ald. 247; *Thompson v. The Sixpenny Savings Bank of N. Y.*, 5 Bosw. 293 309; 6 Bosw. 113.

³ *Rogers v. Weir*, 34 N. Y. 463.

⁴ *Cobb v. Dows*, 10 N. Y. 335; *Olmsted v. Houtaling*, 1 Hill, 317.

⁵ *Woodward v. Washburn*, 3 Denio, 369; *Hart v. Aldrich*, Cowper, 54; *Hall v. Hollander*, 4 Barn. & Cress. 660; *Haywood v. Miller*, 3 Hill, 90.

⁶ The employer may maintain an action against a third party for enticing away his servant. *Haight v. Badgely*, 15 Barb. 499; *Campbell v. Cooper*, 34 N. Hamp. 49.

⁷ Code, Arts. 157, 3172, 2718.

⁸ *Idem*, Arts. 2719, 2720, 2721.

for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed; a responsibility which attaches only when the master might have prevented the act, causing the damage, and has not done it.

§ 398. The servant is responsible to his master for ordinary care and diligence, and for the exercise of that degree of skill which is requisite to a reasonable performance of the work he undertakes; an architect employed to build a bridge, on a plan of his own, for a high degree of skill;¹ a mechanic or artisan for skill in his calling;² and an ordinary servant employed to drive horses, for such skill as may reasonably be expected under the contract of hiring.³

§ 399. *Onus Probandi*. It rests with the party alleging a fact, by way of maintaining or defending an action, to establish it by evidence; this is the general rule, and there is no exception in favor of the party letting chattels on hire. If he allege an injury or loss of his property through the negligence of the defendant, a bailee for hire, he is bound to establish the fact by evidence; it is not ordinarily enough for him to prove an injury or loss while the property was in the hirer's custody; he must also show that it was caused by the negligence of the bailee. His proof must be sufficient to support a verdict, finding the fact of negligence.⁴

A return of a hired horse, injured in such a way as does not ordinarily occur without negligence, reasonably casts upon the hirer the burden of proving how the injury occurred, and that it was not caused by his negligence. *E. g.*, where a horse is hired in a healthy and sound condition, and returned in a foundered and disabled condition, it is justly incumbent on the hirer to exculpate himself.⁵ So in many cases proof of the injury, and of the circumstances attending it, raises a presumption of negligence by the bailee.⁶

¹ Mayor, etc., of Albany v. Cunliff, 2 N. Y. 165. Ante, note to § 77.

² Duncan v. Blundell, 3 Stark. 6; Farnsworth v. Garrard, 3 Campb. 39; Money-penny v. Hartland, 1 Carr. & P. 352; 2 id. 378.

³ Newton v. Pope, 1 Cowen, 109.

⁴ Harrington v. Snyder, 3 Barb. 380. This was a case of hiring, and it holds that the burden of showing negligence rests with the plaintiff; the same rule was held in Newton v. Pope, 1 Cowen, 109; both cases relate to an alleged injury of a horse by carelessness. Runyon v. Caldwell, 7 Humph. R. 134; Browne v. Johnson, 29 Texas, 43. Stewart v. Stone, 127 N. Y. 500, 506; Lamb v. Camden, etc., R. R. & Transp. Co., 46 N. Y. 271. Proof of a conversion by the defendant supersedes the necessity of more specific evidence. Ante, §§ 60, 61. The form of the action bears on the burden of proof. Ante, §§ 62, 155-159, 354; 46 N. Y. 271, 278; 109 Mass. 452; 99 Mass. 605; Perham v. Coney, 117 Mass. 102.

⁵ Collins v. Bennett, 46 N. Y. 490, 494; McDaniel v. Robertson, 26 Vt. 340.

⁶ Curtis v. Rochester & S. R. Co., 18 N. Y. 534, 538, 541. The bailor makes a *prima*

§ 400. A total refusal to return the property without assigning any reason therefor is a conversion of it, and dispenses with any further proof; ¹ and where the form of the action requires it, it is proof from which a loss by the defendant's negligence may be inferred.¹ The failure to return *prima facie* proves a loss by the defendant's negligence;² and a failure to return a part of the goods, with an allegation that they have been lost by theft accompanied by some proof tending to support it, presents a question of fact for the jury.³ A return of the property in a damaged condition, without giving any explanation of the fact, under circumstances where he cannot reasonably remain silent, is held to cast upon the hirer the burden of showing that the injury was not caused by his negligence; on the ground that the facts are peculiarly within his knowledge.⁴ He owes an affirmative duty to return the property unharmed, unless it has been injured from natural decay or from some accident or other means without fault on his part; and since injuries from these causes are exceptional, proof of a return of the goods in a damaged condition is reasonably sufficient to put the bailee on his defence.

§ 401. There being no antecedent contract on the part of the bailee, his mere omission to return a parcel does not establish a loss by his negligence; nor does it prove a conversion, where the package (of money) is not found on a search made; or where bills of exchange are accidentally lost. Plaintiff must establish *prima facie* his cause of action;⁵ and he may do this under some circumstances by proving a total failure to return the property. For example, a warehouseman

facie case when he shows such loss or damage to the chattel as ordinarily does not happen when the care which the law requires in the particular kind of bailment is exercised. *Arnot v. Branconier*, 14 Mo. App. 431.

¹ *Bush v. Miller*, 13 Barb. 481; *Logan v. Mathews*, 6 Barr. R. 417; *Cumins v. Wood*, 44 Ill. 416. See *Ouder Kirk v. Central Nat. Bank*, 119 N. Y. 263; *Fairfax v. New York Cent. & H. R. R. Co.*, 67 N. Y. 11; *Canfield v. Balt. & Ohio R. R. Co.*, 93 N. Y. 532, 538.

² *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184, 189; 5 Robt. 404; *Clarke v. Spence*, 10 Watts R. 335; *Tompkins v. Saltmarsh*, 14 Serg. & Rawle, 275. See *Stewart v. Stone*, 127 N. Y. 500, 506.

³ *Schwerin v. McKie*, 51 N. Y. 180, 186; *Brown v. Waterman*, 10 Cush. 117; *Canfield v. Balt. & O. R. R. Co.*, 93 N. Y. 538; *Lichtenheim v. Boston & Prov. R. Co.*, 11 Cush. 70. Having taken due care of the property, the bailee is not liable for a loss by theft. *Hard v. Nearing*, 44 Barb. 472, 488.

⁴ *Logan v. Mathews*, 6 Barr. R. 417; *Newstadt v. Adams*, 5 Duer, 43, 46; *Willard v. Bridge*, 4 Barb. 361, 367; *Van Horne v. Kermit*, 4 E. D. Smith, 453, 456; *Arent v. Squire*, 1 Daly, 347; *Beekman v. Schonse*, 5 Rawle, 189; *Clark v. Spencer*, 10 Watts, 337; *Cox v. O'Reilly*, 4 Ind. 371; *Schwerin v. McKie*, 51 N. Y. 180, 186.

⁵ *Pittock v. Wells, Fargo & Co.*, 109 Mass. 452; *Smith v. First National Bank in Westfield*, 99 Mass. 605; *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492.

failing to deliver goods is bound to show that the loss of them occurred without a want of ordinary care or diligence on his part; but is not, it seems, bound to show the precise manner of the loss.¹ And a watch-maker failing to return a watch received by him for repairs must show that he used due and reasonable care of the property.² He must do this where he alleges that the property has been stolen from him. He must support his allegation by proof, and so excuse his failure to fulfill his contract.³

§ 402. On the commencement of a trial the *onus probandi* rests with the party holding the affirmative on the issue.* In an action of trover the plaintiff must prove his title and a conversion by the defendant; and the fact of conversion may be proved in many ways. *E. g.*, it may be proved by showing that the defendant hired the goods or chattels in question for use in a particular manner, or on certain terms and conditions; and that he used and injured or destroyed them, in a different manner or in violation of the contract of hiring.⁵ And whatever be the form of the action, the hirer ought to be held liable for all damages, and every mischance or accident befalling the goods or chattels while thus used without authority. He is not to be considered in any better position than a trespasser, where he uses the hired chattel for a different purpose, or in a different manner, from that agreed upon: it does not lie with him to say that the property was destroyed or injured without any want of care on his part, while he was using it without permission.⁶ His position does not materially differ from that of a man who hires a horse for a pleasure drive on a Sunday, and uses him in violation of the void contract; and is held liable for a conversion of the property, on the ground that his use of it exceeds his authority.⁷

¹ *Lichtenheim v. Boston & Prov. R. Co.*, 11 Cush. 70; *Schwerin v. McKie*, 51 N. Y. 180, 186. See *Claffin v. Meyer*, 75 N. Y. 260; *Mills v. Gilbreth*, 47 Me. 320.

² *Brown v. Waterman*, 10 Cush. 117.

³ The hirer is under a contract to return the property. *Hunt v. Wyman*, 100 Mass. 198.

⁴ Where the plaintiff charges negligence the burden does not shift, but rests upon the plaintiff to the close of the trial. *Stewart v. Stone*, 127 N. Y. 500; *Heinemann v. Heard*, 62 N. Y. 448.

⁵ Ante, §§ 381-383; *Perham v. Coney*, 117 Mass. 102; *Malone v. Robinson*, 77 Ga. 719.

⁶ *Beach v. Raritan & Del. Bay R. R. Co.*, 37 N. Y. 457; 5 Bosw. 121, 130; *Sarjeant v. Blunt*, 18 John. R. 74; *Perham v. Coney*, 117 Mass. 102; *Ross v. Southern Cotton Oil Co.*, 41 Fed. Rep. 152.

⁷ *Hall v. Corcoran*, 107 Mass. 251. No effect is given to the hiring as a contract, because it is illegal; as an authority, it relieves the hirer from all liability, while he acts within its terms; exceeding its terms, he becomes a wrongdoer and liable. Ante, §§ 377, 378, 381-383.

§ 403. *Accession.* The increase of herds or flocks, hired for a term of years, belongs to the person who hires them; he acquires under his contract all the profit, utility and advantages to be derived from them during the term; he gains his title and interest by virtue of the contract, and will not take the increase where, under a fair interpretation, the agreement does not give him the increase; as where a mare is taken to pasture, in consideration of her service;¹ or where a slave was hired for the season, and the increase was considered as accruing to the owner;² while under a term for years or for life, the tenant took the issue.³

The owner of personal property, bailed for hire, cannot always follow and reclaim it, after the term has expired. For example, where the owners of real estate, with buildings thereon, hire a steam engine and boilers on an agreement to surrender them at the end of the term; and presently affix the same firmly to the freehold, so that they cannot be removed without seriously injuring the building in which they are placed; and thereupon transfer the premises to a person having no notice of the bailor's claim; the purchaser takes the property. The bailor's remedy is against the hirer.⁴ As between the parties, the title does not pass, where the chattels can be detached without changing their qualities and value.⁵

On the other hand, the owner of real estate is at liberty to diminish the same by suffering the timber to be cut off or the buildings to be detached, and removed in the form of personal property; and where a mortgagee having the right to prevent such removal does not interfere, and the property is removed by the purchaser, in good faith, his title

¹ Wood v. Ash, Owen, 138; Putnam v. Wyley, 8 John. R. 432; Concklin v. Havens, 12 John. R. 314; applied here to the increase of a slave held for a term: principle assumed in Pierce v. Page, 28 Vt. 34; and in Bartlett v. Wheeler, 44 Barb. 162; Bel-lows v. Denison, 9 N. H. 293; Hasbrook v. Bouton, 60 Barb. 413.

² Allen v. Allen, 2 Penn. R. 166; Code Louisiana, Arts. 536, 527, 539. See principle applied in Hasbrook v. Bouton, 60 Barb. 413.

³ Concklin v. Havens, *supra*; Bohn v. Headley, 7 Har. & John. R. 257; Standiford v. Amoss, 1 Har. & John. R. 526. Under the system of slavery, the hirer was required to take reasonable care of slaves hired by him, and to treat them with a humane sense of duty. Lundsford v. Baynham, 10 Humph. R. 267; Ewing v. Thompson, 13 Miss. R. 132; Biles v. Holmes, 11 Ind. R. 16. The wool from a flock of sheep belongs to the owner. Groot v. Gile, 51 N. Y. 431. As to the effect of a lease of premises with fixtures, see Wood v. Beath, 23 Wis. 254.

⁴ Fryatt v. Sullivan Co., 5 Hill, 116; S. C. 7 Hill, 529; Snediker v. Warring, 12 N. Y. 170. See Voorhees v. McGinnis, 48 N. Y. 278, 287; Stillman v. Flenniken, 58 Iowa, 450.

⁵ Ford v. Cobb, 20 N. Y. 344; Tift v. Horton, 53 N. Y. 377; Sisson v. Hibbard, 75 N. Y. 542; Tyson v. Post, 108 N. Y. 217.

will prevail.¹ Cutting off the timber, so as to injure the freehold, is an act of waste ; and it may be prevented by the reversioner or remainderman.² And the mortgagee of the premises may maintain an action against the mortgagor or against his grantee for the removal of timber or buildings, with knowledge that the security will be thereby injured.³

§ 404. *Termination of the Contract.* The contract of hire for use is terminated when it has been fully performed, and in the various ways which interrupt its continuance or prevent its execution. When the time of the bailment has expired, or its object has been accomplished, it is the hirer's duty to restore the things bailed. He cannot retain and use the property beyond the time agreed upon, without rendering himself liable for all casualties ;⁴ nor after the purpose for which it was hired has been accomplished, without being answerable for all damages ;⁵ and yet it can hardly be said that a mere neglect to return, where there is no intention to misappropriate or convert the property, does of itself operate to change the rule of liability.⁶ Under a general hiring, and in the absence of any special agreement or usage determining the time, the return should be made on the bailor's request or within a reasonable time thereafter.⁷ In some situations a demand is necessary before a suit can be maintained ;⁸ and this is doubtless so in all cases

¹ Wilson v. Maltby, 59 N. Y. 126.

² People v. Alberty, 11 Wend. 160; Thomas v. Crofut, 14 N. Y. 474; McGregor v. Brown, 10 N. Y. 114; McCoy v. Wait, 51 Barb. 225; Robinson v. Kime, 70 N. Y. 147; Bouton v. Thomas, 46 Hun, 6; Code of Civil Procedure, §§ 1651, 1652, 1655.

³ Van Pelt v. McGraw, 4 N. Y. 110; Gates v. Joice, 11 John. R. 136.

⁴ Wheelock v. Wheelright, 5 Mass. R. 104; Homer v. Thwing, 3 Pick. R. 492. See ante, § 381.

⁵ Rotch v. Hawes, 12 Pick. 136; Schenck v. Strong, 1 South. 87. In Wheelock v. Wheelright, 5 Mass. 104, the court held that trover and not case was the proper action, where a party hired a horse for a drive of four miles and drove him eight and killed him, and it was agreed that the hirer did not drive immoderately or neglect to feed and cover the horse properly. In Homer v. Thwing, 3 Pick. 492, the same rule was held against an infant defendant on similar facts. In Rotch v. Hawes, 12 Pick. 136, on similar facts, *i. e.*, going beyond the place agreed upon, it was adjudged that trover would not lie, where the owner accepted pay for the whole distance after the return of the horse. The doctrine of these cases is well settled. Disbrow v. Tenbroeck, 4 E. D. Smith, 397; Perham v. Coney, 117 Mass. 102.

⁶ A refusal to return on demand, after the time agreed upon, is clearly tortious; and the hirer may be guilty of a larceny where he hires with the intent to appropriate or steal a chattel. Brannan's Case, 1 City H. Rec. 50; and Jeffer's Case, *id.* 83; Ellis v. People, 21 How. Pr. 356. See People v. Call, 1 Denio, 120; Regina v. Brown, 36 Eng. Law and Eq. 610; 1 Sweeny, 433; Hildebrand v. People, 56 N. Y. 394; Smith v. People, 53 N. Y. 111. See Penal Code, § 528.

⁷ Cobb v. Wallace, 5 Coldw. 539, involves the bailment of a barge, and rights and duties under the contract.

⁸ Westcott v. Thompson, 18 N. Y. 363; Westcott v. Tilton, 1 Duer, 53.

of a general hiring, where the usage or circumstances do not prescribe the time of the return. But where the hiring is for a specific purpose or time, a failure to return the chattel after the time has expired, or the purpose has been fulfilled, is a breach of the contract; and for this reasonable damages may be recovered.¹

§ 405. The mode, time and place of the return are often determined by the circumstances. The hirer is under an implied agreement to restore the chattels, and ordinarily he must return them to the place from which they were taken; ² or to the bailor at his residence; ³ taking care to deliver them into his actual custody.⁴ The place of the return is determined with reference to the nature of the thing to be restored and the relative situation of the parties. Being bound to return the things bailed within a given time, or directly after the purpose for which he hired them has been answered, the hirer stands in a relation to the bailor analogous to that of a debtor to his creditor; and where no place for the return has been agreed upon, he is reasonably bound to seek the bailor and ascertain where he will receive the goods. His duty is not distinguishable from that of a debtor, under a promise to make a payment in specific articles; and it can only be fulfilled by some affirmative action on his part.⁵ At the same time, it is a duty that may be modified by the agreement, and by the implied understanding of the parties arising from the nature of the chattels; ⁶ or from a request relating to the delivery.⁷

§ 406. It is the hirer's duty to restore the goods or chattels to the owner or to his authorized agent; a duty so important that the law does not absolve him from it, or suffer him to answer the owner's action for the goods, by showing that he delivered them to the wrong person by mistake.⁸ The intentional delivery to another party, being unauthorized,

¹ *Russell v. Roberts*, 3 E. D. Smith, 318.

² *Moson v. Briggs*, 16 Mass. R. 453; *Hunt v. Wyman*, 100 Mass. 198.

³ *Barns v. Graham*, 4 Cowen, 452; so held of a note payable in lumber.

⁴ *Esmay v. Fanning*, 9 Barb. 176; *Coykendall v. Eaton*, 55 Barb. 188, 193.

⁵ *Coit v. Houston*, 3 John. Cases, 243; *Lush v. Druse*, 4 Wend. 313; *Barns v. Graham*, 4 Cow. 452. The contract determines the place of payment. *Sheldon v. Skinner*, 4 Wend. 525, 528; *Lobdell v. Hopkins*, 5 Cowen, 516; *Slingerland v. Morse*, 8 John. R. 474; *La Farge v. Rickert*, 5 Wend. 187.

⁶ *Gilbert v. Danforth*, 6 N. Y. (2 Seld.), 585; *Rice v. Churchill*, 2 Denio, 145, holding that the occupation of the maker of a note payable in property or goods bears on and may fix the place of the payment; *Vance v. Bloomer*, 20 Wend. 196, and cases there cited; *Cobb v. Wallace*, *supra*.

⁷ *Wheelock v. Tanner*, 39 N. Y. 481.

⁸ *Esmay v. Fanning*, 9 Barb. 176; *Devereau v. Barclay*, 2 Barn. & Ald. 702; *Packard v. Getman*, 4 Wend. 613; *Wright v. Ames*, 2 Keyes, 221.

is treated as a tortious act, because it deprives the owner of his goods;¹ and because a rule so strict is necessary for the protection of property.² Indeed, the wrongful appropriation or disposition of personal property is often made on a mistake of fact, where the title is in dispute; and in these cases also, an honest intention is quite consistent with a conversion.³

An accidental loss of the goods is not a conversion, and does not render the bailee liable for them;⁴ and in like manner injuries to the property, without misconduct on his part, are to be borne by the owner.

§ 407. Where the bailee has been guilty of an act of conversion, a redelivery of the things bailed will not protect him from an action for the damages sustained by his misuse of the property while in his custody.⁵ The acceptance of the property on its return in a damaged condition, is not a waiver of the bailor's right of action for the damages;⁶ it is merely a fact which may be proved in mitigation of damages.⁷ Taking back the property, and receiving pay for the use of it contrary to the contract, has been treated as a waiver of the action of trover based on such misuse;⁸ and it has been held that taking hire for the unauthorized use of the property, where it is destroyed and not returned, does not preclude the owner from maintaining an action for the conversion.⁹ And it is reasonably clear that an action for damages, based on the bailee's negligence, may be maintained for the injury, after the hire has been paid and the chattel taken back.¹⁰

§ 408. A demand is necessary before suit, where the bailee is under an agreement to deliver on demand; and the circumstances will generally indicate the place where the demand should be made.¹¹ Being bound generally to return the goods on a day named, or within a given

¹ *Spencer v. Blackman*, 9 Wend. 167; *Syeds v. Hay*, 4 T. R. 260. The bailee may recover back the goods. *Hudson River R. R. Co. v. Lounsbury*, 25 Barb. 597; *Hicks v. Cleveland*, 48 N. Y. 84; *Willard v. Bridge*, 4 Barb. 361.

² *Hoffman v. Carow*, 22 Wend. 285; *Boyce v. Brockway*, 31 N. Y. 490.

³ *Everett v. Coffin*, 6 Wend. 603; *Williams v. Merle*, 11 Wend. 80; *Groot v. Gile*, 51 N. Y. 431; *Haddix v. Einstman*, 14 Ill. App. 443; *Laverty v. Snethen*, 68 N. Y. 522; *Roe v. Campbell*, 40 Hun, 49; *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 127.

⁴ *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492.

⁵ *Reynolds v. Shuler*, 5 Cowen R. 323. See *Brewster v. Silliman*, 38 N. Y. 423, 428.

⁶ *Murray v. Burling*, 10 John. R. 172; *Baylies v. Fisher*, 7 Bing, 153; *Gibbs v. Chase*, 10 Mass. 125; *Austin v. Miller*, 74 N. C. 274.

⁷ *Dailey v. Crowley*, 5 Lansing, 301.

⁸ *Rotch v. Hawes*, 12 Pick. 136.

⁹ *Disbrow v. Tenbroeck*, 3 E. D. Smith, 397.

¹⁰ *Fox v. Pruden*, 3 Daly, 187.

¹¹ *Lobdell v. Hopkins*, 5 Cowen, 514; *Farrow v. Bragg*, 30 Ala. 261; *Dunlap v. Hunting*, 2 Denio, 643.

time, the bailee must seek out the party to whom they are to be delivered, and ascertain where he will receive them.¹ And a tender of the articles at the time and place designated or required by the contract, properly and duly set apart and protected, as it will discharge a debtor, is without doubt enough to acquit the bailee of his responsibility for a return of the goods.²

§ 409. The contract of bailment is also terminated by the loss or destruction of the things bailed, without any fault on the part of the bailee;³ because being connected with the custody of the things hired, it cannot continue in force after the subject-matter of the contract ceases to exist. On the death of a chattel hired for a year, there is a failure of consideration for the payment of wages or hire from that point of time; and the bailor must be content to recover compensation up to that date.⁴ And the rule is not different where the hirer has agreed to return the chattel at the end of the term; inasmuch as a total loss of it without fault on his part, discharges him from the duty to restore the property. His agreement to return, does not bind him to insure the property;⁵ and it is not to be interpreted in analogy with the contract of a tenant for a term of years, who is held liable for the rent under the strict rules of the common law even after the buildings on the premises are destroyed by fire.⁶ Allowing the analogy to hold good, the rule is now admitted to be unjust, and it has been changed by statute.⁷

A termination of the bailor's interest in the goods, by a sale or transfer pending the contract of bailment, cannot affect the rights of the bailee; because the bailor can only transfer his reversionary interest; so that a purchaser from him will simply take his title.⁸ A want of title in the bailor does not of itself defeat the contract of bailment; that is to say, where the bailee is not called upon or compelled to recognize

¹ *Scott v. Crane*, 1 Conn. 255; 5 id. 76; 16 Mass. 453; 8 John. 474.

² *Smith v. Loomis*, 7 Conn. 110; *Robinson v. Batchelder*, 4 N. H. 46.

³ For example, a capture of the things bailed by the military forces of the Government. *Watkins v. Roberts*, 26 Ind. 167.

⁴ *Young v. Bruces*, 5 Litt. R. 324; *Collins v. Woodruff*, 4 Eng. R. 463; *Cutler v. Powell*, 6 Term R. 320; *Appleby v. Dodd*, 8 East R. 300; *Muldrow v. Wilmington, etc.*, R. R. Co., 13 Rich. (S. C.) 69.

⁵ *Young v. Bruces*, *supra*; *Harris v. Nichols*, 5 Mun. R. 483; *George v. Elliot*, 2 Hen. & Mun. R. 5.

⁶ *Harrison v. Murrell*, 5 Munroe R. 359; *Gates v. Green*, 4 Paige Ch. R. 355. See *Stewart v. Stone*, 127 N. Y. 500, 507.

⁷ Ch. 345, Laws of N. Y. for 1860; *Graves v. Berdan*, 26 N. Y. 498, 502. Elements, what is a loss by? See *Fash v. Kavanagh*, 24 How. Pr. 347.

⁸ *Hodges v. Hurd*, 47 Ill. 363; *Hardy v. Lemons*, 36 La. Ann. 146.

the title paramount.¹ On the other hand, a termination of the bailor's title, which puts an end to the bailee's right to the further use of the chattel, will end the bailment; as where a slave became free in the middle of the year for which he was hired out by his master.² A sale to the bailee will make him the absolute owner; but a bailment for hire, with a stipulation that the bailee is to become the owner on certain conditions, will not enable him to transfer the title until those conditions are fulfilled.³

§ 410. BAILMENT FOR LABOR AND SERVICES.

In a general sense the hire of labor and services is the essence of every species of bailment, in which a compensation is to be paid for care and attention or labor bestowed upon the things bailed. The hire of custody, where goods are deposited for safe keeping; the contract of wharfingers, carriers, forwarding and commission merchants, factors and other agents, who receive goods to deliver, carry, keep, forward or sell, are all of this nature, and involve a hiring of services.⁴ The subject is usually divided into two branches: first, *locatio operis faciendi*, being the usual contract for labor and services to be bestowed upon the thing bailed; and, second, *locatio operis mercium vehendarum*, which is a contract relating to the carriage of goods for hire. This second branch embraces the duties of common carriers, and requires to be considered by itself.

Where cloth is delivered to a tailor to be made up into a suit of clothes, the contract is for the labor and services of the tailor; this is the object of the bailment, known as *locatio operis faciendi*; but it is not the whole of his undertaking; he is not only obliged to perform his work in a workmanlike manner, but, since he is entitled to a reward, either by express bargain or by implication, he must also take ordinary care of the thing bailed to him.⁵ So, a jeweler who receives a gem to be set or engraved, and a watchmaker with whom a watch is left for repairs, are bound to perform the work skillfully, and keep the articles entrusted to them, with that care and diligence which every man of common prudence and capable of governing a family, takes of his own property of a like kind.⁶

¹ Cook v. Holt, 48 N. Y. 275. See Simpson v. Wrenn, 50 Ill. 222; Parker v. Lombard, 100 Mass. 405; Spooner v. Holmes, 102 Mass. 503.

² Wilkes v. Hughes, 37 Ga. 361; Bibb v. Hunter, 2 Duv. (Ky.) 494.

³ Austin v. Dye, 46 N. Y. 509; Clarke v. Jack, 7 Watts (Pa.), 375. The bailment remains until it is by the agreement converted into a sale. Dunham v. Lee, 24 Vt. 432.

⁴ Jones on Bailm. 97; Story on Bailm. §§ 421, 422.

⁵ Jones on Bailm. 90, 92.

⁶ 2 Kent's Comm. 588; Clark v. Earnshaw, 1 Gow. N. P. C. 30.

The contract is the same wherever materials are delivered to a workman or mechanic to be manufactured or made up by him in the course of his business or trade, and then returned to the owner. Where the same thing is not to be returned in its new or manufactured condition, as where silver is delivered to a silversmith on an agreement that he shall return therefor silver plate of equal value, the contract is one of sale and not one of bailment; it is an exchange of property; ¹ a material point, on account of the different liabilities which may arise out of the transaction in the case of a loss of the property, without any neglect on the part of the silversmith. Whether or not the title passes, depends upon the terms of the contract. If the product of the identical thing delivered is to be returned in its manufactured condition, it is a bailment, though it be changed in the manufacturing process into an entirely new and different article; as where corn is delivered to be manufactured into whisky; ² or logs to be sawed into boards. The process of manufacture does not affect the title.³

§ 411. *Contracts to make or to sell.* Contracts to furnish materials and construct or manufacture goods or chattels or machines, do not involve a bailment, and they are not sales; the title does not pass until the article is finished and delivered, and the statute of frauds does not apply: as in a contract to furnish materials and make a garment or the woodwork of a wagon; ⁴ or to manufacture and deliver a certain amount and quality of paper for a given price; ⁵ or to construct and deliver a ship or cars for a price agreed upon.⁶ The contract is for work and services, and it is the intention of the parties that the title shall pass on the completion and delivery of the property.⁷ The rule is not different where the employer is to furnish some slight portion of the materials; the owner of the principal materials acquires the title to the completed article or structure, the lesser materials becoming his by right of accession.⁸

¹ Norton v. Woodruff, 2 N. Y. 153; 2 Kent's Comm. 589.

² Smith v. James, 7 Cowen, 328.

³ Pierce v. Schenck, 3 Hill R. 28; Smith v. Clark, 21 Wend. 83.

⁴ Crookshank v. Burrell, 18 John. R. 58; Evans v. Wood, 15 Abbott Pr. 416.

⁵ Parsons v. Loucks, 48 N. Y. 17; Spencer v. Cone, 1 Metcalf, 283.

⁶ McConihee v. N. Y. & Erie R. Co., 20 N. Y. 495; Low v. Austin, 20 N. Y. 181; 25 Barb. 26.

⁷ Seymour v. Montgomery, 1 Keyes, 463; Merritt v. Johnson, 7 John. R. 473.

⁸ Merritt v. Johnson, *supra*; McConihee v. N. Y. & Erie R. Co., 20 N. Y. 495. A shipbuilder who agrees to furnish the framework and build a vessel for another retains the title until the vessel is completed and delivered. (Merritt v. Johnson, 7 John. R. 473.) The doctrine held by the English courts is supposed to involve a slight modification of this rule, though it is in substance the same. A shipbuilder contracts to build and complete a ship for his employer, who agrees to pay for her in four install-

§ 412. In like manner where goods are ordered to be made, the materials remain the property of the maker during the process of manufacture.

ments as the work progresses; the first when the keel is laid, the second when at the light plank, and the third and fourth when the ship is launched; before the third installment is paid, the ship is measured with the builder's consent with a view to get her registered in the name of the employer, and thereupon the builder signs the usual certificate of her building; the third installment is paid, and the ship is registered in the name of the employer, on his oath that he is the owner; directly after, the builder commits an act of bankruptcy upon which a commission is subsequently issued and his property conveyed to assignees; two days after, and before the ship is either completed or launched, the employer, with a crew hired by him, takes possession of her and a rudder and cordage made and purchased by the builder for the express purpose of completing the ship; and it is adjudged that the legal effect of the shipbuilder's having signed the certificate to enable the employer to have the ship registered in his name, is to vest in him the general property in the ship from the date of the registry; that the rudder and cordage, made and bought by the builder specifically for the purpose of completing the ship, became part of it and vested in the employer; and, finally, that the builder had not so parted with the possession as to defeat his lien for the fourth installment. (*Woods v. Russell*, 5 Barn. and Ald. R. 942.) The opinion delivered distinguishes this case from that of *Mucklow v. Mangles*, where the advances were not regulated by the progress of the work, and the builder was at liberty to deliver any barge answering the requirements of the contract; and argues that the signing of the certificate of building was a delivery—an act designed to pass the property, so as to enable the employer to swear the title to be in himself; but that it was not such a delivery as to defeat the lien of the builder for the balance due him on the contract. (1 Taunt. R. 318.) In this State (New York) a contract for the building of a vessel or other thing not yet *in esse*, does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery, and approved by such party. *Andrews v. Durant*, 1 Kernan R. 55, and cases there cited.

If a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him. This is the original doctrine of the common law. (*Mucklow v. Mangles*, 1 Taunt. R. 318; *Hinde v. Whitehouse*, 7 East R. 559. This case shows what circumstances will operate to pass the title on a sale by an auctioneer.) The case of *Mucklow v. Mangles* presented this state of facts: Royland, who was a barge-builder, had undertaken to build the barge in question for Pocock; before the work was begun Pocock advanced to Royland some money on account, and as it proceeded he paid him more, to the amount of one hundred and ninety pounds in all, being the whole value of the barge; when it was nearly finished Pocock's name was painted on the stern; Royland became a bankrupt, and two days after the barge was completed, and before a commission of bankruptcy had issued, defendant took it on an execution against Royland, and afterwards on receiving an indemnity from Pocock delivered it up to him; and a verdict was rendered for plaintiffs, who sued as the assignees of the bankrupt Royland. Lord Chief-Justice MANSFIELD: "The only effect of the payment is, that the bankrupt was under a contract to finish the barge; that is quite a different thing from a contract of sale; and until the barge was finished, we cannot say it was so far Pocock's property that he could have taken it away. It was not finished at the time when Royland committed the act of bankruptcy; it was finished only two days

By accepting the order, the maker enters into an executory contract to make and deliver the article called for; and the property does not vest

before the execution." Mr. Justice HEATH, in delivering his opinion in the case, says: This is the species of contract which in the civil law is described by the term *do ut facias*. It comes within the cases which have been held to be executory contracts, and as such not within the statute of frauds, as contracts for the sale of goods. A tradesman often furnishes articles which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods sold. The painting of the name on the stern in this case makes no difference. If the thing be in existence at the time of the order, the property in it passes by the contract, but not so where the subject is to be made. (1 Taunt. R. 318.)

This decision, which is in harmony with the law as held in this State, is, perhaps, partially modified by the subsequent cases decided in the English courts. (Woods v. Russell, 5 Barn. & Ald. R. 942; Carruthers v. Payne, 5 Bing. R. 277; 7 John. R. 473.) In Carruthers v. Payne, a chariot was built to plaintiff's order and paid for by him; when finished in other respects, plaintiff ordered a front seat to be added, but the builder being slow in making this addition, plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. Plaintiff being afterwards dissatisfied, ordered the chariot to be sold; and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became bankrupt, and his assignee seized the chariot; more than three months afterwards, plaintiff commenced this action; and it was held, first, that the plaintiff had sufficient property to maintain trover for the chariot; and secondly, that it did not pass to the assignee as a part of the bankrupt's assigned property (5 Bing. R. 277; see 1 Kernan R. 35). Chief-Justice BEST, in the opinion delivered by him, says: If a case, precisely the same as Mucklow v. Mangles, were to occur again, it might require further consideration; and Mr. Justice PARK adds: I do not say that I should agree with the decision in Mucklow v. Mangles, if the case were to occur again.

It is to be observed, however, that the case in which these observations were made did not involve precisely the same question as that presented in the case here criticised; and in Woods v. Russell, the person for whom the ship was built was not only permitted to register her in his name as his own property, but it was actually built under a superintendent appointed by him (5 Barn. & Ald. R. 945); and he did, also, with the consent of the builder, exercise other acts of ownership over the ship; such as might authorize a jury to find the fact of a delivery for the purpose of passing the title, though they might not be sufficient to show such a delivery as would defeat the builder's lien.

The intent of the parties as declared in the contract must prevail; and where the legal effect of the contract and payments made under it can operate to transfer the title in the vessel to the employer as fast as the work goes on, equity certainly favors that construction; and the English courts do recently interpret the provision for payment by installments at successive stages in the work as equivalent to an express understanding that on such payments the general property in the vessel shall vest in the employer or purchaser. Woods v. Russell, 5 B. & Ald. 942; Clarke v. Spence, 4 A. & E. 448; Read v. Fairbanks, 13 C. B. 692; Atkinson v. Bell, 8 B. & C. 277, 282; Laidler v. Burlinson, 2 M. & W. 602; Wood v. Bell, 5 E. & B. 772; 6 E. & B. 355; 25 L. J. Q. B. 321. The rule as enforced with us vests the property in the party for

in the party ordering it, until it is delivered or tendered to him.¹ Hence a subsequent sale and delivery of the article by the maker to a third person will vest the property in him.² And hence where an order for a specific kind of goods is given, to be selected and sent by the seller, the title does not pass where a different article is sent, until the same is accepted.³ To convert a verbal order, when acted upon, into a sale, the goods must be selected or accepted by the purchaser;⁴ he must, under the statute of frauds, do some act evincing an intention to accept the goods.⁵ Keeping the goods, after a reasonable opportunity to examine them, is evidence of an acceptance.⁶

The distinction between a present sale of goods or chattels, and an executory agreement to manufacture and deliver a certain kind of merchandise or chattels of a given description, is well understood, but not very sharply defined. The statute of frauds applies to sales exceeding fifty dollars in value; but does not apply to an executory agreement for the manufacture of a chattel or of goods made under an order.⁷ It applies to a contract for wheat, to be threshed and delivered;⁸ or flour to be ground; or standing trees to be cut and delivered;⁹ or timber to be slit and dressed in a particular manner.¹⁰ It is a sale when the work is to be done for the seller, in order to prepare the property for delivery under the contract; and it is an agreement for work and services when the thing or chattel bargained for is to be made or brought into existence.¹¹

whom the ship is built, on its delivery in a finished condition. *Andrews v. Durant*, 11 N. Y. 35; 14 N. Y. 611; 20 N. Y. 181, 495; 1 *Keyes*, 463.

¹ *Comfort v. Kiersted*, 26 Barb. 472; *Halterline v. Rice*, 62 Barb. 593.

² *Atkinson v. Bell*, 8 Barn & Cress. 277; *Grafton v. Armitage*, 2 C. B. 336; *Burt v. Dutcher*, 34 N. Y. 493.

³ *Ralph v. Stuart*, 4 E. D. Smith, 627; *Downer v. Thompson*, 6 Hill, 208; 2 Hill, 238; *Howard v. Hoey*, 23 Wend. 350.

⁴ *Rodgers v. Phillips*, 40 N. Y. 519; *Maxwell v. Brown*, 39 Maine, 98; *Frostburg M. Co. v. New Eng. Glass Co.*, 9 Cush. 115; *Allard v. Greasert*, 61 N. Y. 1; *Pierson v. Crooks*, 115 N. Y. 539; *Pope v. Allis*, 115 U. S. 363.

⁵ *Caulkins v. Hellman*, 47 N. Y. 449; *Stone v. Browning*, 68 N. Y. 598; *Cooke v. Millard*, 65 N. Y. 352.

⁶ *Dutchess Co. v. Harding*, 49 N. Y. 321; *Konitzky v. Meyer*, 49 N. Y. 571; *Pierson v. Crooks*, 115 N. Y. 539.

⁷ *Sewal v. Fitch*, 8 Cowen, 215; *Parsons v. Loncks*, 48 N. Y. 17; *Deal v. Maxwell*, 51 N. Y. 652; *Warren Chemical & Manfg. Co. v. Holbrook*, 118 N. Y. 586.

⁸ *Downs v. Ross*, 23 Wend. 270.

⁹ *Smith v. N. Y. C. R. R. Co.*, 4 Abbott Ct. of App. Dec. 262; 4 *Keyes*, 180; *Smith v. Surman*, 9 B. & C. 568.

¹⁰ *Cooke v. Millard*, 5 Lansing, 243; S. C. 65 N. Y. 352.

¹¹ *Courtright v. Stewart*, 19 Barb. 456; *Stephens v. Santee*, 51 Barb. 532, 545; *Webster v. Zieilly*, 52 Barb. 482; *Bates v. Coster*, 1 Hun, 400; *Cooke v. Millard*, 65 N. Y. 352.

The present form of the statute in England and in some of the States has been adopted for the purpose of making it apply to executory sales of goods to be made, procured or prepared for delivery ; and it applies by judicial interpretation where the contract is such that it will result in the transfer of a chattel.¹

Under the old statute, still existing in most of our States, contracts for the manufacture of a special kind of goods or wares, or for the construction of chattels, machines or vehicles of a specified character, style or dimensions, are not within the statute ; as where a paper-maker agreed to manufacture and deliver so many thousand pounds of book paper, of a specified quality ;² or where a pump was ordered to be made in a peculiar way ;³ or where a certain quantity of malleable hoe shanks were ordered, to be made according to patterns left with contractor ;⁴ or where a monument, existing in the form of separate blocks of marble, was ordered to be finished, lettered and set up ;⁵ or where a chariot or carriage is ordered of a given kind ;⁶ or where an engine or boiler is ordered to be constructed for a given purpose.⁷ In England and in some of our States, an order given to a manufacturer for a certain quantity of goods which he is habitually manufacturing and keeps on hand to supply orders, is treated as creating a contract of sale ;⁸ with this qualification, that where the order calls for the manufacturer's own labor and skill in the production of the goods, or for a peculiar article unfitted for the general market, or for a large quantity of an article having special adaptations, it is to be treated as creating a contract for work and labor.⁹

§ 413. An executory contract for the sale of specific personal property is within the statute of frauds ;¹⁰ and it does not pass the title.¹¹ Ord-

¹ *Lee v. Griffin*, 20 L. J. Q. B. 252; 1 *Ellis, B. & S.* 272 : action by a dentist to recover for two sets of artificial teeth made for a lady—a case clearly not within the original statute. See *Grover v. Buck*, 3 M. & S. 178; and *Towers v. Osborne*, 1 Strange, 506.

² *Parsons v. Loucks*, 48 N. Y. 17; *Deal v. Maxwell*, 51 N. Y. 652.

³ *Parker v. Schenck*, 28 Barb. 38.

⁴ *Hight v. Ripley*, 19 Maine, 139.

⁵ *Mead v. Case*, 33 Barb. 202. The only doubt about this case is whether the court correctly applied the rule to the facts. See review of this and other cases above cited in *Cooke v. Millard*, 65 N. Y. 352–363.

⁶ *Towers v. Osborne*, 1 Strange, 506; *Mixer v. Howell*, 21 Pick. 206.

⁷ See *Neaffie v. Hart*, 4 Lansing, 4, and cases there cited, for the nature of the contract.

⁸ *Gardner v. Joy*, 9 Met. 179; *Atwater v. Hough*, 29 Conn. 508; *Lamb v. Crofts*, 12 Met. 356.

⁹ *Passaic Manuf. Co. v. Hoffman*, 3 Daly, 495; *Allen v. Jarvis*, 20 Conn. 38.

¹⁰ *Jackson v. Covert*, 5 Wend. 139; *Rondeau v. Wyatt*, 2 H. Black, 63; *Cooper v. Elston*, 7 Term R. 14.

¹¹ *Burt v. Dutcher*, 34 N. Y. 493.

narly the title passes on the performance or fulfillment of the contract; that is to say, the title passes by force of the contract as soon as the terms of the sale are complied with. A valid present sale on a credit passes the title at once;¹ and a like sale for cash passes the title on payment of the purchase money.² The title does not pass on a sale of goods, where something remains to be done by the seller to ascertain their identity, quantity or quality, or to put them in proper condition for delivery: the goods sold must be designated, ascertained, identified;³ selected or weighed.⁴ But even here the intent of the parties must prevail; and the title will pass without any separation of the goods sold from a larger mass, where the price is paid and the transaction evinces an intention to pass the title.⁵

§ 414. *Title under a Bailment for Services.* A delivery of materials to be manufactured and returned does not operate upon the title; but a delivery of goods or materials in exchange for other things does transfer the title. The owner of some wheat delivers it to a miller, who receives and places it in a common bin with other wheat purchased by him on his own account; the delivery made on an agreement by the miller that for every four bushels and fifty-five pounds of wheat received, he will deliver to the owner of the wheat one barrel of fine flour warranted to bear inspection, amounts to an exchange or sale of the wheat for a price to be paid in flour.⁶ The same rule holds where the miller agrees to *take* so much wheat and *give* so much flour therefor, without any promise that the flour shall be manufactured from the

¹ *Dox v. Dey*, 3 Wend. 356.

² *Olyphant v. Baker*, 5 Denio, 379; *Lansing v. Turner*, 2 John. 13; *Terry v. Wheeler*, 25 N. Y. 520; *Curtis v. Prinderville*, 53 Barb. 186.

³ *Field v. Moore, Hill & Denio*, 418; *Rapelye v. Mackie*, 6 Cowen, 250; *Stevens v. Eno*, 10 Barb. 95. See *Blossom v. Shotton*, 59 Hun, 481; 128 N. Y. 679. This rule has reference to a sale, not of specific property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of determining the total value thereof at specified rates or a designated fixed price. *Groat v. Gile*, 51 N. Y. 431; *Sanger v. Waterbury*, 116 N. Y. 371; *Burrows v. Whitaker*, 71 N. Y. 291.

⁴ *Keeler v. Vandevere*, 5 Lans. 313; *Joyce v. Adams*, 8 N. Y. 291. See *Howe v. Carpenter*, 53 Barb. 382; *Russell v. Nicholl*, 3 Wend. 112; *Fitch & Lozee v. Beach*, 15 Wend. 221; *Ward v. Shaw*, 7 Wend. 404; *Outwater v. Dodge*, 7 Cow. 850.

⁵ *Kimberly v. Patchin*, 19 N. Y. 330; *Russell v. Carrington*, 42 N. Y. 118. See *Burrows v. Whitaker*, 71 N. Y. 291; *Sanger v. Waterbury*, 116 N. Y. 371; *Andrews v. Richmond*, 34 Hun, 20, 24.

⁶ *Smith v. Clark*, 21 Wend. 83. See *Andrews v. Richmond*, 34 Hun, 20, 23; *Ledyard v. Hibbard*, 48 Mich. 474; *Rice v. Nixon*, 97 Ind. 97; *Carlisle v. Wallace*, 12 Ind. 252; *Ashby v. West*, 3 Ind. 170.

same wheat.¹ But an agreement to take wheat and manufacture and return it in the form of flour is a contract of another kind; it is a bailment.² It is a sale when the receiver of the material is only bound to return a manufactured article of equal value; and it is a bailment when the same thing is to be returned in its new or manufactured form.³

§ 415. Our courts have had frequent occasion to draw this line of discrimination between a sale and a bailment. It has been frequently done with reference to contracts for domestic animals, cattle or sheep used as stock upon a farm. A delivery on hire, on an agreement that the same chattels are to be returned at a future day, does not pass the title; while a delivery on an agreement that the same or like cattle or sheep of equal value shall be delivered to the owner amounts to a sale, because it gives the lessee the option of treating it as a sale; so that pending the agreement the original owner cannot assert any title to the chattels covered by the contract.⁴ The terms of the letting control the question of title: if the hirer can satisfy the terms of his agreement by returning at the end of the term the same number of cattle or sheep of equal value, the contract operates as a sale.⁵ And as such it must be made in writing, where the value of the property exceeds fifty dollars, or where the contract is not to be performed within one year.⁶

§ 416. A delivery of materials to be manufactured on shares creates a bailment, and on a fulfillment of the contract operates as a transfer of the share coming to the bailee.⁷ The bailee earns his share by performing the contract on his part, and he remains a mere bailee until he fulfills the contract.⁸ The relation of the parties is similar to that which arises where one man cultivates the land of another on an agreement that the crops raised shall be divided between them in certain proportions; the parties become tenants in common of the crops,⁹ with a right to have the same divided according to the contract.¹⁰ The delivery of milk to a cheese factory, to be converted into and returned in

¹ Norton v. Woodruff, 2 N. Y. 153.

² Mallory v. Willis, 4 N. Y. 76.

³ Foster v. Pettibone, 7 N. Y. 433.

⁴ Hurd v. West, 7 Cowen, 752.

⁵ Wilson v. Finney, 13 John. R. 358; Carpenter v. Griffin, 9 Paige Ch. 310.

⁶ Bartlett v. Wheeler, 44 Barb. 162; Wier v. Hill, 2 Lansing, 278, a thriftless bargain; Lockwood v. Barnes, 3 Hill, 128, showing some want of foresight.

⁷ Pierce v. Schenck, 3 Hill, 28; post, § 447.

⁸ Barker v. Roberts, 8 Greenl. 101; Rightmyer v. Raymond, 12 Wend. 51; Tripp v. Riley, 15 Barb. 333; Hyde v. Cookson, 21 Barb. 92. In this case in a suit by the owner for a conversion after considerable work had been done in the process of manufacture, the defendant the bailee was allowed to diminish the recovery *pro tanto*.

⁹ Channon v. Lusk, 2 Lansing, 211, 216.

¹⁰ Faber v. Shattuck, 22 Barb. 568.

the form of cheese, is a bailment where the factory is owned and operated by a party on his own account, as a distinct business; and it is a special contract where the factory is operated on account of the persons delivering their milk to be manufactured, each person to receive his proportion of the cheese. Before any division is made the parties own the cheese as tenants in common; and though not partners, they are jointly liable on a contract of sale made by their agent or committee.¹

A tenancy in common of personal property may, it seems, arise from accident or casualty; as where firewood belonging to different parties is swept away and scattered by a freshet, and afterwards gathered by one of them.² It more often arises from the act or contract of the parties; as where they make a joint purchase of goods, or where one delivers to another cattle or swine to fatten on shares. The relation being once established, each party has the usual remedy for a violation of his right of property.³

§ 417. Our decisions furnish the most reliable illustrations of the rules of law, as well as the most apt and felicitous. The owner of a quantity of black salts delivers them to a manufacturer on an agreement that he will work them into pearl-lashes and redeliver them to the owner in casks ready for the market at the manufactory; the salts are kept separate from the others, and the substance or chemical properties of the alkali are not materially changed in the process of the manufacture; when the work is finished, the casks containing the pearl-lashes are rolled into the highway, separated and covered as the property of the person furnishing the salts; the title here is not changed, and the delivery into the street is tantamount to a delivery to the owner.⁴ There is nothing in the process to work a change in the title; as there is not in the process of converting wood into coal;⁵ or timber into boards;⁶ or grain into whisky.⁷

The delivery of hides to be tanned and manufactured into leather, and afterward returned and sold, creates a bailment; even where the manufacturer is entitled to the proceeds of the sale, after

¹ *Hawley v. Keeler*, 62 Barb. 231; *Wilber v. Sisson*, 53 Barb. 258, 264. The factory may now be organized as a corporation. *Durst v. Burton*, 2 Lansing, 137. As to the effect of the destruction of the factory by fire before the time contemplated for the termination of the bailment, see *Stewart v. Stone*, 127 N. Y. 500.

² *Moore v. Erie Railway Co.*, 7 Lansing, 39.

³ *Sheldon v. Skinner*, 4 Wend. 525; *Fobes v. Shattuck*, 22 Barb. 568; *Nowlen v. Colt*, 6 Hill, 461.

⁴ *Babcock v. Gill*, 10 John. R. 287.

⁵ *Curtis v. Groat*, 6 John. 168.

⁶ *Baker v. Wheeler*, 8 Wend. 505.

⁷ *Silbury v. McCoon*, 3 N. Y. 378.

deducting the cost of the hides, interest, commissions and other expenses. The right of property remains unchanged.¹ The rule is the same where cotton cloth is delivered to calico printers, to be printed and returned, and sold in the market; the printers to be paid the proceeds of the sale, after deducting the cost of the cloth and commissions. The transaction does not affect the title;² and where it is part of the agreement that the manufactured article shall be returned and sold by the owner, the bailee does not acquire any lien upon the property.

§ 418. An existing state of things is presumed to continue; and a right of property once acquired, remains until it is transferred. Hence under a contract to make or manufacture or furnish goods, the title remains in the owner unless it is transferred by the legal effect of the agreement.³ Where the owner of a quantity of cotton yarn delivered it to a manufacturer at the price of sixty-five cents per pound, to be paid for in plaids at fifteen cents per yard, the receiver to use the cotton yarn in making the warp of the plaids, and to use for the filling other yarn of as good a quality; it was held that the title passed; that the transaction amounted to a sale of the yarn at a specified price, to be paid for in plaids at a specified price.⁴ The case lies hard by the line which separates a sale from a bailment; for it is conceded by the judge delivering the opinion, that the title would not have passed if the delivery had been on an agreement that the receiver should find the filling and manufacture the yarn into plaids on their joint account, the cloth to be divided according to their respective interests in the materials.⁵ And it has been adjudged that the title does not pass, where rags are delivered to a manufacturer at a certain price, to be made into paper and returned at a certain price; the paper being actually made according to the contract, out of the identical rags delivered.⁶ The mode adopted in the contract to fix the measure of compensation to be paid for the services, does not affect the title. A delivery for manufacture is a bailment, unless the legal effect or natural operation of the contract works a transfer of the property.⁷

¹ *Hyde v. Cookson*, 21 Barb. 92.

² *Wood v. Orser*, 25 N. Y. 348.

³ *Westcott v. Thompson*, 18 N. Y. 393, where ale was sold and delivered in barrels, the barrels to be returned, or paid for at \$2 each, in case any were not returned.

⁴ *Duer*, 53; and see *Peck v. Armstrong*, 38 Barb. 215.

⁵ *Buffum v. Merry*, 3 Mason, 478.

⁶ *Eaton v. Lynde*, 15 Mass. 242.

⁷ *King v. Humphreys*, 10 Penn. St. 217.

⁸ *Barber v. Roberts*, 8 Maine, 8 Greenl. 101; *Brown v. Hitchcock*, 28 Vt. 452; *Malory v. Willis*, 4 N. Y. (Comst.) 76.

§ 419. Chattels and things delivered to an artisan or mechanic for repairs remain the owner's property, without regard to the value of the work or materials employed in the process of repair, and without regard to the relation which the expenses of the repairs bear to the original value of the chattel. Thus, where the owner of an old wagon left it with a blacksmith who was owing him, to be repaired on account of the debt, and the blacksmith took it to pieces, purchased on his own account entirely new woodwork, with the exception of the tongue and eveners, ironed it, and had it painted at his own expense, it was held, that the title still remained in the original owner.¹

§ 420. *Bailee's Right of Property and Lien.* The bailee for hire of labor and services has an interest or special property in the chattels upon which his labor and services are performed.² An artisan has a lien upon the article manufactured by him until he is paid for his labor, or parts with the possession pursuant to the terms of his agreement; ³ so held in the case of a brickmaker, who manufactured a quantity of brick, on a brickyard furnished by another with wood and other necessities to carry on the work, the agreement being to pay the manufacturer so much per thousand for the brick made and shipped, on the return of the vessel in which the same were carried to market. Where, in such case, the brick were seized and sold as the property of the employer, under an execution against him, it was held that an action of trover lay by the brickmaker against the purchaser who removed the same; but that the purchaser might show the state of the accounts between the employer and the brickmaker, and that the latter should recover only the amount of his lien upon the brick taken by the purchaser.⁴ In other words, that the general property was in the employer, and capable of being sold on an execution against him; while the special property, including the legal right to the possession, remained in the manufacturer until extinguished by a voluntary delivery.⁵

§ 421. So where a quantity of cotton yarn was delivered to a bailee,

¹ Gregory v. Stryker, 2 Denio, 628.

² 2 Denio R. 628.

³ Hazard v. Manning, 8 Hun, 613; Conrow v. Little, 115 N. Y. 387, 393; Arians v. Brickley, 65 Wis. 26. The lien is not affected by the fact that the person entitled to it has recovered a judgment against the bailor for the value of the labor performed, so long as the judgment remains unsatisfied. Pate v. Hoffman, 61 Hun, 386. No express contract is necessary to create the lien. The law gives it to the person performing the labor. Hazard v. Manning, 8 Hun, 613.

⁴ Moore v. Hitchcock, 4 Wend. R. 292; Wheeler v. McFarland, 10 Wend. 318, 324.

⁵ Moore v. Hitchcock, 4 Wend. 292, 296; Grinnell v. Cook, 3 Hill, 485, 491. There was in the case stated no question raised as to the right of the sheriff to seize the property on execution.

upon an agreement that he should procure it to be woven into cloth and receive a commission thereon as the price of the labor ;¹ and he delivered the yarn to another person to weave for him at an agreed price to be paid in goods ; and the cloth, being woven, was attached as the property of the weaver ; it was held that the bailee receiving the yarn to be woven into cloth had a special property in the cloth, and that the weaver acted as his servant or agent, having no property or legal interest in the cloth.² The rule is the same where logs are delivered at a saw-mill under a contract with the miller that he shall saw them into boards, within a specified time, on shares ; the general property remains in the owner of the logs until the work is finished according to contract ; and the bailee for hire of services can have no lien for a part or partial performance of his agreement.³ When a manufacturer receives goods for the purpose of being wrought in the course of his trade, the contract is entire ; and without a stipulation to the contrary, he has no right to demand payment until the work is complete. *A fortiori* he has no right to carve out payment for himself, without consulting the bailor. A miller is entitled to take toll from your grist, on grinding it ; but suppose he chooses to grind only a part, and then sells the whole. He is not entitled to toll for what he had actually ground. It is like the common case of a man undertaking to labor during a certain time, or in performing a certain amount of work for so much ; his work must be finished before he can claim payment ; and if he fails to perform according to his contract, he cannot acquire by lien that which he cannot legally demand.⁴

Where the agreement is to manufacture chattels on shares, on a completion of the work, the parties to the contract become as we have seen tenants in common of the manufactured goods. And the bailee has a right to retain the goods until a division has been made and he has been paid the stipulated compensation for his labor, whether it be one-tenth or one-half. Of course he acquires the absolute title to his portion of the goods from the time they are specifically set apart to him in payment.⁵

§ 422. Every bailee for hire, who by his labor or skill imparts additional value to the goods, has a lien thereon for his charges, there being

¹ Eaton v. Lynde, 15 Mass. R. 242.

² 15 Mass. R. 242.

³ Pierce v. Schenck, 3 Hill R. 28.

⁴ Pierce v. Schenck, 3 Hill, 28, 30, 31. If he performs until prevented from completing his contract by the other party, he has a lien for the work done, and also for any act done, or labor performed, or money expended in the preparation of the instrumentalities by which the work was to be performed by him. Conrow v. Little, 115 N. Y. 387, 393.

⁵ Pierce v. Schenck, 3 Hill, 28.

no special contract inconsistent with such lien. The lien exists equally, whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price, unless there be a future time of payment fixed. In that case the special agreement would be inconsistent with the right of lien, and would destroy it.¹

The bailee's lien extends to every portion of the goods or materials delivered under one contract, and is not confined to the particular portion *pro rata*, on which the labor has been bestowed; so that the bailee, by a delivery of a part of the manufactured goods, does not defeat his lien upon the remainder for his whole services.² So, too, where several parcels of goods, belonging to one owner, are carried the same voyage, a delivery of part of them does not divest the carrier of his lien on the remainder for the whole freight.³

§ 423. The bailee waives his lien by surrendering the goods to the bailor; and he loses it as to third persons by such a surrender, though he stipulates that his lien shall continue.⁴ He also waives his lien by any contract inconsistent with its continuance; as where a mechanic agrees to look to a third person for his pay for repairs made upon a wagon;⁵ or where he agrees to give credit for a stipulated time;⁶ or agrees upon a mode and time of payment excluding the theory of a lien.⁷ But the special agreement cannot be set up by the bailor after he has himself failed to perform it, to defeat the artisan's lien at common law.⁸ His lien, originating in the customs and usages of business, is favored on grounds of equity and convenience; and yet not so much favored as the vendor's lien, or equitable right to the purchase money of the goods sold by him.⁹

§ 424. The bailee may defend or assert his interest in the goods; he

¹ Blake v. Nicholson, 3 Maule & Selw. R. 168; Chase v. Wetmore, 5 id. 180; Crawshaw v. Homfray, 4 Barn. & Ald. R. 50; Burdick v. Murray, 3 Verm. R. 302.

² Morgan v. Congdon, 4 Const. R. 552; Wiles Laundering Co. v. Hahlo, 105 N. Y. 234; Hensel v. Noble, 95 Pa. St. 345; Holderman v. Manier, 104 Ind. 118.

³ Schmidt v. Blood, 9 Wend. R. 268; McFarland v. Wheeler, 26 id. 467.

⁴ McFarland v. Wheeler, 26 Wend. 467; Marvin v. Smith, 56 Barb. 600; Morse v. Andros. R. R. Co., 39 Maine, 285; Smith v. Greenop, 60 Mich. 61; Sensenbreuner v. Matthews, 48 Wis. 250.

⁵ Bailey v. Adams, 14 Wend. 201.

⁶ Fielding v. Mills, 2 Bosw. 489. Where it is agreed that credit is to be given for the price of the work done, not limited to a period preceding the time for the return of the article, the contract is inconsistent with the right of lien and none can be set up. Wiles Laundering Co. v. Hahlo, 105 N. Y. 234, 242; Stoddard Woolen Manuf. Co. v. Huntly, 8 N. H. 441.

⁷ Trust v. Pirsson, 1 Hilton, 292.

⁸ Mount v. Williams, 11 Wend. 77; Conrow v. Little, 115 N. Y. 387.

⁹ Fieldings v. Mills, *supra*, and Benedict v. Field, 16 N. Y. 595.

may retain the goods and defend his interest in them, as against the owner, and as against third persons. He may maintain an action of trespass against any one interfering with his possessions ;¹ and an action of trover against the party seizing and detaining the goods.² His recovery as against the owner, or as against the party succeeding to his interest, is limited to the amount of his demand. On a total breach of the contract by the bailee, as where he pawns the property, the owner may at once recover its value in trover, without tendering the amount for which it was delivered in pledge.³ And on completion of the work, the bailor has the right of immediate possession as against third persons and strangers.⁴ Admitting that the bailee's lien is not lost, where he allows a third party to take the goods on payment of his charges, it is quite clear that the third party forfeits the lien by any attempt to dispose of the property in defiance of the owner's title.⁵ A sale of the goods by him defeats the lien.⁶

§ 425. *Losses, by whom borne.* The general rule is that the owner must bear the loss of goods destroyed by fire or by casualties of a like kind. The bailee is not liable where the goods are lost or destroyed without any neglect on his part.⁷ If materials are delivered to him to manufacture, or if an article is entrusted to him to be repaired in the course of his business, and it is accidentally destroyed before the work is completed, the loss falls upon the owner. And hence it is held that an action lies by a shipwright for work and labor done, and materials delivered in repairing a ship, which is casually burnt in the dock by a fire communicated from an adjacent building, before the repairs are completed.⁸

On the other hand, where a mechanic or manufacturer is employed to make or manufacture an article out of his own materials, the title remains in him until the finished article is delivered, and he must bear the loss where it is destroyed by accident or fire. And as he bestows his labor and services upon his own property, he cannot recover for them as a separate demand.⁹ His only claim upon the employer is under the

¹ Benedict v. Murray, 3 Vt. R. 302.

² Moore v. Hitchcock, 4 Wend. 292.

³ Gallaher v. Cohen, 1 Browne, 43.

⁴ King v. Humphreys, 10 Barr R. 217.

⁵ Nash v. Mosher, 19 Wend. 431.

⁶ Dudley v. Hawley, 40 Barb. 397; Ely v. Ehle, 3 N. Y. 506; Barrett v. Warren, 3 Hill, 348.

⁷ Hurd v. West, 7 Cow. 752; 2 N. Y. 153; Buddin v. Fortunato, 31 State Rep'r, 278.

⁸ Menetone v. Athawes, 3 Burr. R. 1592; 2 Kent's Comm. 591; Atkinson v. Bell, 8 B. & C. 277.

⁹ Atkinson v. Bell, *supra*.

contract; and that only gives him the price of the article, when it is finished and delivered.¹

It is quite clear that the owner of goods or materials bailed for work and services upon them, has an insurable interest in the property; and that the bailee also has an insurable interest.² The party on whom a loss by fire must fall, may protect himself by procuring a policy of insurance on the property.³ A factor may procure a policy in his own name covering its full value, and the moneys received thereon belong to the owner, after satisfying the factor's lien.⁴

§ 426. HIRE OF LABOR AND SERVICES GENERALLY.

A brief consideration of the principles applicable to contracts of this class is in place here, because they bear with equal force upon the contract of bailment. Under a contract for work and services, the contractor must perform in a workmanlike manner.⁵ Where materials are delivered to be manufactured, and the work done upon them is not properly performed, the bailee cannot demand compensation therefor; it being a settled principle that where there has been no beneficial service there shall be no pay.⁶ Without any express agreement on the subject, the employer must pay a reasonable compensation for the services rendered him on his request or at his instance.⁷ And the contract being silent on the subject, the artisan or mechanic is bound to render faithful and diligent services. The law requires of each man in his vocation diligence and skill. It requires this of a carpenter or mason. When he sues for work and labor under a general retainer, the value of his services depends upon the skill and fidelity with which they were rendered: he recovers the worth of his services, *quantum meruit*.⁸ The same principle applies where a blacksmith or farrier is employed to shoe a horse, or a tailor to make a garment, or a watchmaker to repair a watch. The law implies a contract on the part of each that he will

¹ *Mixer v. Howarth*, 21 Pick. R. 207; Code of Louisiana, Arts. 2729, 2730.

² *Van Natta v. The Mutual S. Ins. Co.*, 2 Sandf. 490.

³ *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401; 3 Keyes, 87. A lienor has no claim to the moneys paid by the insurer to the owner. *Carter v. Rockett*, 8 Paige, 437.

⁴ *Edwards on Factors and Brokers*, § 75.

⁵ *Williams v. Keech*, 4 Hill, 168.

⁶ *Farnsworth v. Garrard*, 1 Campb. 38.

⁷ A promise to pay is implied; *Hicks v. Burhans*, 10 John. R. 243; *Dunbar v. Williams*, 10 John. 249; *Robinson v. Raynor*, 28 N. Y. 494; but not contrary to the fact; *Galvin v. Prentice*, 45 N. Y. 162; *Topping v. Swords*, 1 E. D. Smith, 609; or presumed fact; *Williams v. Hutchinson*, 3 N. Y. 312.

⁸ *Grant v. Button*, 14 John. R. 277; *Emery v. Smith*, 46 N. H. 151; *Adams v. Woonsocket Co.*, 11 Met. 327; *Williams v. Keech*, 4 Hill, 168; *Farnsworth v. Garrard*, 1 Campb. 38.

perform the work entrusted to him within the line of his business diligently and skillfully ; and it takes some care that he shall be properly educated in the duties of his calling.¹

§ 427. The degree of intelligence and skill required of a man by the law depends much upon his calling. An engineer, a lawyer or physician must be specially educated to the duties of his calling ; besides the requisite scientific knowledge, he must have reasonable skill in its application. Compared with unprofessional men, he must possess a high degree of intelligence, together with the accurate and exact knowledge of an expert. Physicians, for example, must have a knowledge of the healing art ;² and though medicine be not one of the exact sciences, it is quite clear that skill in the practice of medicine can only be acquired by the study and acquisition of those sciences which stand related to the practice, such as physiology and chemistry ; and by close observation and experience in the treatment of diseases. It is equally evident that the skill of a surgeon can only be gained by a perfect union of science with practice. The law assumes the necessity of this union, and implies a contract on the part of the physician or surgeon that he possesses and will exercise reasonable and ordinary skill in his profession ; not the highest degree of science and skill ; but that reasonable measure of knowledge and skill which will enable him to discharge the duties he assumes with discretion and safety. He does not warrant a cure, or the success of an operation ; and he is not responsible for a mistake, or for an error of judgment, in matters of reasonable doubt or uncertainty. Where there is but one recognized and approved mode of treatment, his departure from it will render him liable for the consequences ; but where a different treatment is followed by different schools of medicine, he is at liberty to follow the practice of his own school.

The same rule applies to men engaged in the different branches or departments of the medical profession ; with perhaps a little more strictness, where a man devotes himself to a single line of practice ; as accoucheur, surgeon, or oculist.³

§ 428. There is a tacit understanding, in the employment of a physi-

¹ 3 Black. Comm. 165. Our system of apprenticeship is designed for the education and training of the young in the art or business which they are to pursue in life. 1 Black. Comm. 426.

² *Carpenter v. Blake*, 50 N. Y. 696, reversing S. C. 60 Barb. 188.

³ *Rich et uxor v. Pierpont*, 3 F. & F. 35. (Action for want of due and proper care and skill as accoucheur.) "To render a medical man liable, even civilly, for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of

cian, that he will follow his usual practice; that being a botanic physician, he will follow that system;¹ or a homeopathic physician, that he

care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result."

Ruddock v. Lowe, 4 F. & F. 519. (Malpractice as a doctor.) "A person not qualified, as not being a regular medical practitioner, but assuming to be or to practice as such, and undertaking to treat another for a disease, is liable for injury caused by ignorant and improper treatment, by which the patient is rendered worse instead of better, and is injured by the use of improper medicine."

Hancke v. Hooper, 7 C. & P. 81. (Malpractice as a surgeon.) "A surgeon is responsible for an injury done to a patient, through the want of proper skill in his apprenticeship; but in an action against him, the plaintiff must show that the injury was produced by such want of skill, and it is not to be inferred. And if a person goes into a surgeon's shop and asks to be bled, saying he has found relief from it before, and does not consult the person there as to the propriety of performing the operation, if there are no external indications of its being improper, such person is justified in performing it, and the surgeon will not be answerable for its not producing a beneficial result."

Langhiep and wife v. Phipos, 8 C. & P. 475. (Malpractice as a surgeon.) "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill; he does not, if he is an attorney, undertake at all events to gain the cause; nor does a surgeon undertake that he will perform a cure; nor does the latter undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring a fair, reasonable and competent degree of skill; and in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to the want of a proper degree of skill and care in the defendant, or not."

Wilmot v. Howard, 39 Vt. 447. (Malpractice in setting plaintiff's arm and inattention thereafter, etc.) There is an implied obligation on a man holding himself out to the community as a surgeon, and practicing that profession, that he should possess the ordinary skill in surgery of the profession generally. Where, by improper treatment of an injury by a surgeon, the patient must inevitably have a defective arm, the surgeon is liable to action, even though the mismanagement or negligence of those having the care of the patient may have aggravated the case and rendered the ultimate condition of the arm worse than it otherwise would have been. The liability of the surgeon being established, the showing of such mismanagement or negligence only affects the measure and amount of damages."

Long v. Morrison, 14 Ind. 595. (Malpractice in causing death of patient.) "A physician is liable for damages arising as well from the want of skill, as from neglect in the application of skill."

Wood v. Clapp, 4 Sued. 65. (Malpractice in reducing a fracture in the arm—surgeon.) "A person assuming to be qualified for the exercise of any profession, art or vocation, is responsible for any damage which may result to those who employ him, from the want of the necessary knowledge, skill and science which such profession demands. The law does not, however, require the highest degree of skill and science, but only such reasonable degree as will enable the person safely and dis-

¹ *Bournan v. Woods*, 1 Iowa, 441.

will follow that system.¹ And it would seem that an inexperienced person, employed with a perfect knowledge of his want of experience,

creetly to discharge the duties assumed; and the mere failure of a course of treatment is not of *itself* conclusive as to such want of skill in the practitioner."

Patten v. Wiggin, 51 Me. 594. (Action for professional services—defense malpractice—defendant more injured than benefited, etc.) "Physicians and surgeons who offer themselves to the public as practitioners impliedly promise thereby that they possess the requisite knowledge and skill to enable them to treat such cases as they undertake with reasonable success. This rule does not require the possession of the highest, or even the average skill, knowledge or experience, but only such as will enable them to treat the case understandingly and safely. The law also implies that, in the treatment of all cases which they undertake, they will exercise reasonable and ordinary care and diligence. They are also bound always to use their best skill and judgment in determining the nature of the malady and the best mode of treatment, and in all respects to do their best to secure a perfect restoration of their patients to health and soundness. But physicians and surgeons do not impliedly warrant the recovery of their patients, and are not liable on account of any failure in that respect, unless through some default of their own duty, as already defined. If the settled practice and law of the profession allows of but one course of treatment in the case, then any departure from such course might properly be regarded as the result of want of knowledge, skill, experience or attention. If there are different schools of practice, all that any physician or surgeon undertakes is, that he understands and will faithfully treat the case according to the recognized law and rules of *his* particular school."

Howard v. Grover, 28 Me. 97. (Malpractice as a surgeon.) "A surgeon is not liable for a want of the highest degree of skill in the performance of an operation in the line of his duty; but only for the want of ordinary skill, and for the want of ordinary care and ordinary judgment."

Fowler v. Sergeant, 1 Grant's Cases, 355. (Malpractice as surgeon, in setting a limb.) "A physician or surgeon is not chargeable for ignorance of a case, if he prescribes for it rightly."

Ritchey v. West, 23 Ill. 385. (For injuries arising from negligence and lack of skill in defendant.) "When a person assumes the profession of physician and surgeon, the law holds him responsible for any injury arising from a want of reasonable care, skill and diligence in his practice, unless the services rendered were gratuitous [in which case he is liable only for gross negligence]."

Hord v. Grimes, 13 B. Mon. 188. (Action for causing death of a slave.) "A physician is responsible for all the ill consequences which may result from the administration of medicine to a slave, without the consent of the owner."

Bowman v. Woods, 19 Greene, 441. (Malpractice in a case of accouchement.) "The law implies an undertaking on the part of every medical practitioner that he will use an ordinary degree of care and skill in his practice, and will hold him liable for gross carelessness or unskillfulness. A physician is expected to practice according to his professed and avowed system."

Smothers v. Hanks, 34 Iowa, 286. (Malpractice in treating a fracture.) The law requires of physicians and surgeons in the treatment of their patients the use of ordinary skill and diligence only, the average of that possessed by the profession as a body, and not of the thoroughly educated only; having regard to the improvements and advanced state of the profession at the time of the treatment. The case of

¹ *Corsi v. Maretzek*, 4 E. D. Smith, 1.

is only liable for the exercise of diligence and such skill as he possesses. On the same ground, a physician of much experience and great skill

McCandless v. McWha, 22 Penn. St. 261, criticised and reviewed. Ch. J. Beck dissented, holding, that the law requires the use of that skill and diligence ordinarily exercised by the thoroughly educated physicians and surgeons.

Bellinger v. Craigie, 31 Barb. 534. (Malpractice in treatment of a broken limb.) "The law implies an undertaking on the part of a physician or surgeon that he has ordinary skill, and that he will execute the business intrusted to him with ordinary care and skill. If he fails in this duty, he is guilty of a default in his undertaking, and cannot collect the pay for his services, but is liable in damages to the person who employed him."

Carpenter v. Blake, 60 Barb. 488. (Negligence and malpractice in treatment of arm, etc.) "One holding himself out as a surgeon is liable as well for want of skill as for negligence; and the injured party may bring his action to recover for damages resulting from both, and recover on proving damages resulting from either." In such a case, the questions to be decided, are, 1st, whether the defendant possessed the ordinary skill of persons acting as surgeons; and 2d, if he did, whether he was chargeable with negligence in not applying it in his treatment of the plaintiff. The decision of the Supreme Court was reversed in the appellate court, the Court of Appeals holding that whether defendant was or was not skillful in his profession, to be a material issue. 50 N. Y. 696; S. C. again, 10 Hun, 358; 75 N. Y. 12.

Corsi v. Maretzek, 4 E. D. Smith, 1. (The question was, whether a homeopathic physician is a "regular physician.") "In the absence of special statutes, the law does not exclusively recognize any particular system of medicine or class of medical practitioners." "Medicine is a progressive rather than an exact science; and in determining the legal significance of the word 'physician, or doctor,' when used in a contract, the term must be held to mean any person who makes it his regular business to practice physic."

Simonds v. Henry, 39 Mo. 155. (Assumpsit for a set of artificial teeth.) A dentist is required to use a *reasonable degree* of care and skill in the manufacture and fitting of artificial teeth. The exercise of the *highest perfection* of his art is not implied in his professional contract.

Leighton v. Sargent, 27 N. H. (or 7 Fost.) 460. (Negligence, etc., in treating a fracture.) A physician or surgeon, without a special contract for that purpose, is never considered as warranting a cure. His contract, as implied in law, is, that, 1. he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession; 2. that he will use reasonable and ordinary care and diligence in the treatment of the case committed to him; 3. that he will use his best judgment, in all cases of doubt, as to the best course of treatment. He is not responsible for want of success unless it is proved to result from want of ordinary skill, or want of ordinary care and attention. He is not presumed to engage for extraordinary skill, or for extraordinary diligence and care. He is not responsible for errors of judgment, or mere mistakes in matters of reasonable doubt and uncertainty.

McNevin v. Lowe, 40 Ill. 209. (Malpractice as a surgeon.) "The highest degree of care and skill is not required of a physician to relieve him from liability for damages resulting from his treatment of a patient; only reasonable care and skill are necessary." But if a person holds himself out to the public as a physician, he must be held to ordinary care and skill in every case of which he assumes the charge,

should be held to the exercise of more than ordinary skill; and a specialist to the exercise of at least the ordinary skill of professional men engaged in his specialty. And yet it is quite clear that the common law, while it goes upon the theory of contract up to a certain point, does really favor a rule of uniform application, demanding of professional men both ordinary skill and diligence; diligence, with reasonable skill.¹

§ 429. A surveyor, an engineer, an architect or builder is answerable to his employer for reasonable and ordinary skill in the work on which he is employed, within the line of his business. He comes under an obligation to his employer; his duty springs out of his contract, and it is not always commensurate with that of his employer towards the public or third persons.² Employed as a skilled workman or artist, he engages to perform the work with the requisite ability and skill; his engagement to this effect is implied from his profession or habitual occupation.³ Employed as an engineer in the erection of a bridge, he is bound to ascertain for himself the nature of the soil, by actual examination and experiment;⁴ and he is answerable to his employer for the proper construction of the bridge with a view to its strength and

whether in the particular case he has received fees or not. Where he does not profess to be a physician, however, nor to practice as such, and is merely asked his advice as a friend or neighbor, he does not incur any professional responsibility. The case of *Ritchey v. West*, 23 Ill. 385, is to be understood in this sense.

The current of authority calls for reasonable and ordinary intelligence and skill in the practice of medicine, regard being had to the advanced state of the healing art. And it is well settled that a physician cannot be held chargeable, where his patient's refusal to follow his prescription or his negligence contributes to the injury sustained. *McCandless v. McWha*, 22 Penn. St. 261; *Hibbard v. Thompson*, 109 Mass. 286; *Tefft v. Wilcox*, 6 Kans. 46; *Heath v. Gilson*, 3 Oregon, 64; see case of inoculation; *Landon v. Humphrey*, 9 Conn. 209.

¹ *Carpenter v. Blake*, 60 Barb. 488; S. C. 50 N. Y. 696; 10 Hun, 358; 75 N. Y. 12; *Leighton v. Sargent*, 27 N. H. 460; *McNevin v. Lowe*, 40 Ill. 209; *McCandless v. McWha*, 22 Penn. St. 261; *Landon v. Humphrey*, 6 Conn. 209; *Ruddock v. Lowe*, 4 F. & F. 519.

² *Cunliff v. Mayor, etc., of Albany*, 2 Barb. 190; S. C. 2 N. Y. 165, case of a bridge negligently built. See *Loop v. Litchfield*, 42 N. Y. 351; and see *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

³ *Harmer v. Cornelius*, 5 C. B. (N. S.) 236.

⁴ *Moneypenny v. Hartland*, 1 Carr & Payne, 352; S. C. 2 id. 378. The plaintiff was employed by defendants as architect and engineer in the work of building a bridge over the Severn, and this action was brought by him to recover compensation for his services; and it was held to be the plaintiff's duty to examine for himself into the nature of the soil; that in making his plans and estimates he is not at liberty to act upon information received from another person; and further, that he is not entitled to compensation for his services, where his estimates of the expense to be acted upon turn out incorrect (being too low) to a considerable extent; whether such error arises from negligence or want of skill.

safety, so far as the plan and materials are left to his discretion. He impliedly undertakes that he possesses and will exercise the requisite ability and skill in the work he undertakes; he assumes a responsibility involving exact knowledge and professional skill. His ability is analogous to that of a manufacturer who makes an article to order, for a given use, where the mode of the manufacture is left to his discretion. Acting under a contract which specifies the plan and materials of the structure, his liability does not extend beyond the terms of his agreement; and yet even here he cannot recover unless he fulfills the terms of the contract, or at least takes care that the bridge is built in a workmanlike manner.¹

§ 430. An attorney or counselor is bound by the same rule of diligence as other business men;² and like the members of the medical profession, he must bring to the discharge of the duties assumed by him the ordinary skill of prudent men engaged in the same calling. He does not guaranty the accuracy of his opinion upon difficult ques-

¹ Harmer v. Cornelius, 5 Com. Bench, N. S. 236. The plaintiff was employed by the defendant as an artist, a panorama and scene painter, for, at least one month, at so much a week; being found incompetent he was discharged at the end of the second day; and the action was brought for wrongfully dismissing the plaintiff. WELLS, J.: "When a skilled laborer, artisan or artist is employed there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—*Spondes peritiam artis*. Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill. * * * An engineer is retained by a railway company, for a year, to drive an express train, and is found to be utterly unskillful and incompetent to drive or regulate the locomotive—are the railway company still bound, under pain of an action, to entrust the lives of thousands to his dangerous and demonstrated incapacity? A clerk is retained for a year to keep a merchant's books, and it turns out that he is ignorant, not only of bookkeeping, but of arithmetic—is the merchant bound to continue him in his employment?" See Jenkins v. Betham, 15 Com. Bench, 168, 189; Losee v. Clute, 51 N. Y. 494. Taft v. Inhabitants of Montague, 14 Mass. 282. In this case the plaintiff brought his action to recover on a special contract to build for the defendants a stone bridge for a price agreed upon; and it appearing that the plaintiff had used improper materials, and constructed the bridge so defectively that it gave way and soon after proved worthless, it was held that he could not recover on the contract because he had not fulfilled it on his part, nor on a *quantum meruit*, because the defendants had received no benefit from the plaintiff's labor. The bridge was built in the autumn of 1810, and it stood until the spring of 1812, having been occasionally repaired during that time. In cases of this kind the contractor is not allowed to ignore the contract and recover the value of his services without reference to it; unless it appears that the work was carried on with the knowledge and assent of his employer, or accepted by him after it was finished. Jewell v. Schroepel, 4 Cow. 564

² Gleason v. Clark, 9 Cow. 57.

tions of law, or the success of a suit or proceeding;¹ and he does impliedly hold himself out to the world as qualified for the business, and familiar with that branch of it pursued by him.² He undertakes to transact the business entrusted to him, with a reasonable knowledge of the law, and with diligence; and though seldom held liable for errors of opinion or mistakes in the choice of remedies, he is occasionally condemned in damages for omissions, blunders and negligence; for inattention to the rules of practice; for the omission of an act necessary to the protection of his client; for delays in the commencement of an action; for a failure to prepare a cause for trial; and for similar neglects of duty whereby his client is injured.³ He is also liable for the neglect of his clerk, and for the misconduct of those employed by him in the transaction of his business.⁴

§ 431. In England the attorney does, but the barrister or counselor does not, enter into a contract with his client; and hence while the attorney may recover of his client a compensation for his services, the counselor cannot. He accepts a fee as the Roman patron did of his client, paid to him in advance as a gratuity or present.⁵ With us the relation, though one of honor and confidence, is also one of contract; and a counselor as well as an attorney may recover the value of his services, being liable like any other man for negligence or any breach of his contract.⁶ Valid and defensible as the English rule may be, in a society

¹ *Bowman v. Tallman*, 27 How. Pr. 212, 273; *S. C.* 40 id. 1; *Purves v. Landell*, 12 Clark & Finnelly, 91; *Parker v. Rolls*, 14 C. B. 691; *Wilson v. Russ*, 20 Me. 421; *Gambert v. Hart*, 44 Cal. 542; *Walpole v. Carlisle*, 32 Ind. 415; *Babbitt v. Bumpus*, 73 Mich. 331; *Steven v. Walker*, 55 Ill. 151; *Nat. Savings Bank v. Ward*, 100 U. S. 195; *Lamphier v. Phipos*, 8 Carr. & Payne, 475.

² *Donaldson v. Holdane*, 7 C. & T. 762; *Gambert v. Hart*, 44 Cal. 542; *Carter v. Tallcot*, 36 Hun, 393, 396.

³ *Parker v. Rolls*, 14 C. B. 691; *Godefroy v. Dalton*, 6 Bing. 468; *Knights v. Quarles*, 2 Bro. & B. 102; *Cooper v. Stevenson*, 21 L. J. N. S. (Q. B.), 292; *Walpole v. Carlisle*, 32 Ind. 415; *Stevens v. Walker*, 55 Ill. 151; *Long v. Orsi*, 18 C. B. 610; *A. B.'s estate*, 1 Tucker (N. Y.), 247; *Arnold v. Robertson*, 3 Daly, 298; *Hopping v. Quinn*, 12 Wend. 517, 519; *Nat. Savings Bank v. Ward*, 100 U. S. 195; *Von Wallhoffen v. Newcombe*, 10 Hun, 236; *Carter v. Talcott*, 36 Hun, 393.

⁴ *Floyd v. Nagle*, 3 Atk. 568; *Rhines v. Evans*, 66 Penn. St. 192; *Bradstreet v. Everson*, 72 Penn. St. 124. The attorney's clerk in his absence may transact the ordinary business of the office—such as is usually entrusted to him; *Power v. Kent*, 1 Cowen, 211; *Sibley v. Waffle*, 16 N. Y. 183; he cannot discontinue an action; *Irvine v. Spring*, 35 How. Pr. 479; *S. C.* 7 Robt. 293; or give a discharge of a debt without satisfaction; *Carter v. Talcott*, 10 Vt. 471.

⁵ 2 *Broom & Hadley's Comm.* 19-30, Amer. Ed.

⁶ *Stevens v. Adams*, 23 Wend. 57; *S. C.* 26 Wend. 451; *Balsbaugh v. Frazer*, 9 Penn. St. 95; *In re Paschal*, 10 Wallace, 483. The English rule is held in New Jersey. *Seeley v. Crane*, 3 Green (N. J.), 35.

deeply penetrated with the sentiments appropriate to and inspired by her recognized ranks in life, it is quite evident that the theory of contract is nearer to the truth and more consonant to the better sense and spirit of American society. The sense of honor is not weakened when it is married to a sense of duty.

The duty of the advocate or counselor arises out of the contract created by his retainer and the relation thus established between him and his client; just as the duty of an attorney springs from his retainer.¹ The fact of a retainer being proved, as it may be in various ways; as by showing a verbal request, or the actual conduct of a cause with the client's knowledge, or any circumstances from which a retainer may be fairly inferred;² the counsel or attorney may recover the value of his services, proving the same where there is no contract fixing the compensation, as in any other action for services.³ If in such an action the defense goes to destroy the plaintiff's claim entirely, or to lessen the amount, it may be given in evidence under a general denial;⁴ the value of the services is in issue.⁵ An attorney cannot recover for services rendered valueless through his negligence; and he cannot recover costs against his client for services in recovering a judgment which is set aside for irregularity, or the costs of opposing the motion to set aside his irregular proceedings, or money paid to satisfy the costs of a judgment of discontinuance suffered through his negligence or ignorance. The attorney is bound to know what the law is; and if, having a note placed in his hands for collection, he bring a suit on it on the last day of grace, the bringing of such suit will be imputed either to his ignorance or negligence; and in either case he cannot recover against his client for such fruitless services.⁶

§ 432. The civil law provides for the creation of religious corporations, and in many ways fosters and protects our churches on account of the influences springing from them as sources of civil virtue and public morality. It recognizes them as charities, entitled to legal protection.⁷ The separation declared in our fundamental law between the

¹ *Fray v. Voules*, 1 E. & E. 839; *Prestwich v. Poley*, 18 C. B. N. S. 806; *Chown v. Parrott*, 14 C. B. N. S. 74.

² *Manchester Bank v. Fellows*, 28 N. H. 302; *Hirshfield v. Landman*, 3 E. D. Smith, 208; *Pixley v. Butts*, 2 Cow. 421; *Hotchkiss v. Le Roy*, 9 John. R. 142.

³ *Garfield v. Kirk*, 65 Barb. 464; *Smith v. Davis*, 45 N. H. 566; *Webb v. Browning*, 14 Mo. 353; *Hadley v. Ayers*, 12 Abbott N. S. 240.

⁴ *Schemerhorn v. Van Allen*, 18 Barb. 29.

⁵ *Gleason v. Clark*, 9 Cow. 57.

⁶ *Hopping v. Quinn*, 12 Wend. 517; *Gleason v. Clark*, *supra*; *Nixon v. Phelps*, 29 Vt. 198; and see *Carter v. Talleot*, 36 Hun, 393; *Von Wallhoffen v. Newcombe*, 10 Hun, 236, 240.

⁷ Our statutes are framed to protect as well as create religious corporations. The

church and state is not hostile but friendly to religion; it is in spirit an institute of freedom.¹ The civil law does not therefore prescribe to our ministers and clergymen any rule of care and diligence in their calling. Having created the religious corporation, it leaves the body free to make contracts to accomplish the purposes of its being; and enforces these contracts according to their true intent and meaning.² Under a contract for the services of a minister or clergyman referring to the discipline and government of the church, the court is at liberty to examine the church polity so far as to determine the question of performance under the agreement; and it is adjudged that a failure in readiness and ability to perform, arising from misconduct and immorality, authorizes a dissolution of the contract. A severance of the relation between the minister and the society, in the manner prescribed by the rules of the body, terminates the contract.³ The law will not permit the property of the corporation to be used, for the support of a minister, while he is under a sentence of deprivation.⁴

§ 433. *Contracts for Personal Services.* Equity does not decree a specific performance of a contract for personal services.⁵ Two reasons are assigned in refusal of this form of remedy; namely, respect for personal freedom, and the impossibility of enforcing the performance of a stipulation for personal services according to the true intent of the contract. Thus, a court of equity will not enter a decree to compel an

People *et al.* v. Tuthill, 31 N. Y. 550. And the general law of the country is animated by the same spirit. See Judge Strong's "Discourses on the Relations of Civil Law to Church Polity, Discipline and Property," and Hoffman's Ecclesiastical Law.

¹ "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of the press."—Article I. of the Amendments to the U. S. Constitution. The words of the State Constitution are equally explicit: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief."—Art. I. § 3.

² Moore v. Fox, 10 John. R. 244; The First Religious Society of Whitestown v. Stone, 7 John. R. 115. A "call" to a minister is the act of the society or corporation; Paddock v. Brown, 6 Hill, 530. It is for an indefinite time. Sheldon v. Easton, 24 Pick. 281.

³ Dutch Church of Albany v. Bradford, 8 Cowen, 457; Dieffendorf v. Reformed Calvinist Church, 20 John. R. 12.

⁴ Robertson v. Bullions, 9 Barb. 64; S. C. 11 N. Y. 243, and cases cited in those decisions; Gram v. The Prussia, etc, German Society, 36 N. Y. 161; People v. Rector, etc., of Church of the Atonement, 48 Barb. 603; Youngs v. Ransom, 31 Barb. 49.

⁵ Haight v. Badgley, 15 Barb. 499; Mapleson v. Del Puente, 13 Abb. N. C. 144; Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498; Wakeham v. Barker, 82 Cal. 46; William Rogers Manuf. Co. v. Rogers, 58 Conn. 356; Wollensac v. Briggs, 119 Ill. 453. See Marsh v. Blackman, 50 Barb. 329.

actor to fulfill his engagement for a season or for a term of years;¹ or to compel a person to sing in an opera;² the court will not decree an active performance; but it will (in England) decree a negative performance, where a person has agreed not to act or sing in any other theater or opera for a given time; and will enjoin him from so acting or singing pending the suit.³ But the remedy so full of vigor has been refused in this State *pendente lite*, where an injunction was prayed for against an artist, a painter, who, it was alleged, had agreed to give his exclusive time and services to the firm of which he was a member, and there was some conflict in regard to the substance of the contract.⁴ And in the absence of an explicit negative agreement, an injunction will not be granted with a view to enforce an affirmative performance of the contract.⁵

§ 434. An artist's contract to execute a work of art is strictly personal; he is not permitted to perform his agreement to paint a portrait by the hand of another.⁶ And the same rule applies to all contracts for personal services. The employed has therefore no assignable interest in the contract so long as it remains wholly executory. After the services have been performed, the demand therefor is assignable like any chose in action;⁷ and a cause of action for the breach of the contract is assignable.⁸ On the other hand, the employer may assign a contract for general services;⁹ or for materials and work involving skill, like the building of a boat.¹⁰ But he cannot assign contracts for menial services, or domestic services that are to be rendered in the employer's family; and he cannot assign a contract of apprenticeship, since that involves a personal trust;¹¹ and yet the master's engagement under the assignment will bind him,¹² and the apprentice assenting to the

¹ *Hamblin v. Dinneford*, 2 Edwards Ch. R. 529; *Morris v. Colman*, 18 Ves. 437; *Clarke v. Price*, 2 Wilson, 157; *Kemble v. Kean*, 6 Sim. R. 333.

² *De Rivafinoli v. Corsetti*, 4 Paige Ch. 264; *Sanquirico v. Bendetti*, 1 Barb. 315. But see *Duff v. Russell*, 39 State Rep'r, 266; *Pratt v. Montegriffo*, 25 Abb. N. C. 334.

³ *Lumley v. Wagner*, 1 De G. M. & G. 604; 13 Eng. L. & Eq. 252; *Rolfe v. Rolfe*, 15 Sim. 88. This seems to be the rule in this State. *Metropolitan Exhibition Co. v. Ward*, 24 Abb. N. C. 393; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C. 419; *Daly v. Smith*, 49 How. 150. See *Cort v. Lassard*, 18 Oregon, 221.

⁴ *Fredericks v. Mayer*, 1 Bosw. 227; 13 How. Pr. 566.

⁵ *Butler v. Galletti*, 21 How. Pr. 465.

⁶ *Francois v. Oeks*, 2 E. D. Smith, 417.

⁷ *Hooker v. Eagle Bank*, 30 N. Y. 83.

⁸ *Monahan v. Story*, 2 E. D. Smith, 393.

⁹ *Horner v. Wood*, 23 N. Y. 350, contract for the labor of convicts in a prison.

¹⁰ *Osborn v. Thomas*, 46 Barb. 514.

¹¹ *Futrill v. Vaun*, 8 Md. 402; *Hall v. Gardner*, 1 Mass. 172.

¹² *Nickerson v. Howard*, 19 John. 113.

transfer will not be permitted to recover of the assignee for his services.¹

§ 435. A party is not permitted to abandon, or to arrest the execution of a contract which can be specifically enforced by a decree in equity²—a contract under which the damages cannot be established or ascertained with exactness, or until the lapse of a long time or the death of one of the parties³—a contract under which a compensation in damages does not furnish a complete and satisfactory remedy.⁴

Under an ordinary contract for work and materials, the employer has a right to stop short and countermand the order given for the work; and the employee has no right to go on after the countermand and increase the damages to be recovered for the breach of the contract.⁵ On the contrary, it is his duty to take care to diminish the amount of the damages, as far as he can without injury to himself.⁶

§ 436. An infant who engages to work for a certain length of time may rescind the contract and recover the value of the services rendered by him; and the value of these services is to be ascertained without any reference to the contract.⁷ The master of an apprentice being entitled to his earnings, may recover them of the person for whom the services were rendered, even where the employer had no knowledge of the apprenticeship.⁸ But in the action for enticing a minor son or an apprentice from the service of his father or master, knowledge of the relation as still subsisting must be shown, and the fact of enticement from the service due to the plaintiff.⁹

§ 437. Under an agreement to work for so many days or months, for a compensation which expressly or impliedly becomes due at the end of the service, the work must be performed before any compensation can be recovered; the contract being entire, performance is a condition precedent to the right of recovery. The laborer must perform his contract, like any other person; and where he performs only a part of it, and

¹ Williams v. Finch, 2 Barb. 208.

² Marsh v. Blackman, 50 Barb. 329.

³ Rhodes v. Rhodes, 3 Sandf. Ch. 279.

⁴ Phillips v. Berger, 2 Barb. 608; S. C. 8 Barb. 527.

⁵ Clark v. Marsiglia, 1 Denio, 317; Goodwin v. Kirker, 2 Hilton, 401.

⁶ Wilson v. Martin, 1 Denio, 602, 605; Hamilton v. McPherson, 28 N. Y. 72, 77; Dillon v. Anderson, 43 N. Y. 231, 237; Howard v. Daly, 61 N. Y. 362; Johnson v. Meeker, 96 N. Y. 93; Roberts v. White, 73 N. Y. 375.

⁷ Whitmarsh v. Hall, 3 Denio, 375; Derocher v. Continental Mills, 58 Me. 217; 4 Amer. R. 285; Vent v. Osgood, 19 Pick. 572; Myers v. Rehkopf, 30 Ill. App. 209; Hagerty v. Nashua Lock Co., 62 N. H. 576.

⁸ James v. Le Roy, 6 John. R. 274; Hiatt v. Gilmer, 6 Ind. 450; Munsey v. Goodwin, 3 N. H. 272.

⁹ Caughey v. Smith, 47 N. Y. 244; Butterfield v. Ashley, 6 Cush. 249.

then without cause or the consent or fault of the other party abandons the work, he cannot recover on an implied assumpsit for the labor actually performed. And the rule is the same where he engages to perform an entire job of work.¹ Rough language from the employer does not release the laborer from his contract; or from his duty to obey lawful and reasonable commands.² And though the contract be invalid because not in writing, the laborer is not at liberty to quit and recover for the services rendered, so long as the employer fulfills the agreement on his part.³ On a default by the employer to go on, a recovery may be had for the services rendered.⁴

Under an agreement for a year's services, providing for a payment of wages monthly or quarterly, the employee may recover the wages earned and payable under the contract, without showing a subsequent full performance; and where he quits without cause before the end of the year, he recovers the amount which has become payable under the contract, less the damages sustained by the breach of it. And the same rule applies where the parties have adjusted the amount earned, and the employer has given his note therefor, prior to the end of the term.⁵

§ 438. Under a contract for a year's personal service, a failure to perform on account of sickness or death relieves the employee from the terms of the contract; and the law gives him or his legal representative a right to recover the value of the services rendered. The act of God excuses performance of a condition; so does the act of the law; and where valuable services have been rendered under the contract, the employee recovers upon a *quantum meruit*.⁶ The law does not and

¹ *McMillan v. Vanderlip*, 12 John. 165; *Jennings v. Camp*, 13 John. 95; *Lantry v. Parks*, 8 Cow. 63; *Monell v. Burns*, 4 Denio, 121; *Reab v. Moor*, 19 John. R. 337; *Diefenback v. Stark*, 56 Wis. 462; *Koplitz v. Powell*, 56 Wis. 671; *Nelichka v. Estartly*, 29 Minn. 146; *Earp v. Tyler*, 73 Mo. 617; *Powers v. Wilson*, 47 Iowa, 666. He cannot recover where he is dismissed for cause, before he is entitled to any wages under the contract. *Huntingdon v. Clafin*, 10 Bosw. 262; S. C. 38 N. Y. 182.

² *Marsh v. Ruleson*, 1 Wend. 514.

³ *Galvin v. Prentice*, 45 N. Y. 162, contract for two years, invalid under the statute of frauds.

⁴ *Monroe v. Butt*, 8 Ellis & B. 738.

⁵ *Thorp v. White*, 13 John. R. 53; *Hoor v. Clute*, 15 John. R. 224; *Oviatt v. Hughes*, 41 Barb. 541; *Walker v. Millard*, 29 N. Y. 375; *Heim v. Wolf*, 1 E. D. Smith, 70.

⁶ *Fahy v. North*, 19 Barb. 341; *Fenton v. Clark*, 11 Vt. 557; *Fuller v. Brown*, 11 Metc. 440; *Wolf v. Howes*, 24 Barb. 174, 666; S. C. 20 N. Y. 197; *Jones v. Judd*, 4 N. Y. 411; *People v. Manning*, 8 Cowen, 297; *Carpenter v. Stevens*, 12 Wend. 589. See *Spalding v. Rosa*, 71 N. Y. 40, 44; *Lacy v. Getman*, 119 N. Y. 109, 114; *Babcock v. Goodrich*, 3 How. Pr. N. S. 53; *Seymour v. Cogger*, 13 Hun, 29.

cannot give him the benefit of an actual performance;¹ it proceeds rather upon the theory of an implied understanding, that the party shall be excused in case he is unable to render his personal services according to the contract. Where the services are of such a nature that they can be, and they are performed for him by another, he may recover the stipulated compensation;² as he may, *pro rata*, where that appears to be the fair value of his services.³

The contractor may also recover where performance of the work is hindered or delayed by the employer or by those in his service, or left unfinished at his request.⁴ If one contractor delays the work of another, the delay is attributable to the employer, and is therefore excused; as it is where the employer orders a change in the amount or mode of the work, and so delays its completion.⁵

§ 439. Each party must perform in the order of time required by the contract; and where by its terms the work is to be commenced under the employer's direction, and for want of timely directions the contractor is prevented from performing the work within the stipulated time, and subsequently does the work at an expense enhanced in consequence of the delay, he is not obliged under the old practice to bring his action upon the contract, but may resort to the *quantum meruit* to obtain his indemnity.⁶ Under the Code he alleges all the facts, the contract, the delay and the increase of the expense caused by the delay; and recovers damages for a breach of the contract.⁷ Being prevented from fulfilling the contract, after partly performing it, he is entitled to recover ratably the stipulated compensation, or damages for a breach of the agreement.⁸ And where the contract is departed from by mutual consent, the work being partly done under its terms and partly in a deviation from them, the payment is to be made according to the agree-

¹ *Tompkins v. Dudley*, 25 N. Y. 272; *Dexter v. Norton*, 47 N. Y. 62.

² *Gray v. Murray*, 3 John. Ch. 167, 179.

³ *Clark v. Gilbert*, 26 N. Y. 279; 5 Mich. 449; 27 Vt. 759.

⁴ *Devlin v. Second Ave. R. R. Co.*, 44 Barb. 81; *Farnham v. Ross*, 2 Hall, 167; *Van Buskirk v. Stow*, 42 Barb. 9; *Russell v. Da Bandiera*, 13 Com. B. N. S. 148; *Dannat v. Fuller*, 120 N. Y. 554. When the agreement so provides, the delay of one contractor will not excuse another. *Shute v. Hamilton*, 3 Daly, 462.

⁵ *Stewart v. Keteltas*, 36 N. Y. 388; *Van Buskirk v. Stow*, 42 Barb. 9; *Weeks v. Little*, 89 N. Y. 566; *Cooke v. Odd Fellows' Fraternal Union*, 49 Hun, 23; *Anderson v. Meislahn*, 12 Daly, 149.

⁶ *Dubois v. Del. & Hudson Canal Co.*, 4 Wend. R. 285; S. C. 12 Wend. 334; 15 Wend. 87.

⁷ *Allamon v. Mayor, etc.*, of Albany, 43 Barb. 33. He must perform or show excuse for his failure. *White v. Hewitt*, 1 E. D. Smith, 395; *Oakley v. Morton*, 11 N. Y. 25; 4 Duer, 295.

⁸ *Jones v. Judd*, 4 N. Y. 411; *Clark v. Mayor, etc.*, of New York, 4 N. Y. 338.

ment as far as it can be traced; and beyond that according to the true value of the work.¹

When the contractor abandons the contract while the work is in progress on account of the employer's failure to furnish the materials in season, he recovers the contract prices for the work done, unless it is shown that the work was rendered more expensive by the delay. Being compelled to do the work at additional expense in a less favorable season, he may recover what his work was reasonably worth; in other words, he recovers the contract prices where he works under the contract, with such additional expenses as he incurs by the delay.² This appears to be the just and legal measure of damages.

§ 440. When the work is to be finished by a given time and the contractor fails to fulfill his stipulation in that respect, the employer does not waive his right of action for damages by permitting the work to go on after a breach; nor does he preclude himself from setting up the damages sustained by him by way of recoupment, when sued for the work and services³—a recoupment being considered in law as a partial defense, to be pleaded.⁴ A general denial in an action for services puts in issue the fact of a substantial performance.⁵ A waiver of strict performance as the work goes on, and a tacit extension of the time of performance, will be deemed a waiver of damages on account of such defect or failure in fulfilling the contract.⁶ So a departure from the terms of the contract, at the request of the employer, excuses performance within the time;⁷ and the giving of an acceptance or note for work done under a contract, not called for by its terms, modifies the contract in that respect; it changes the time of payment.⁸ A payment on account of the work done has the same effect; it cannot be recovered back where the work actually rendered exceeds the payment in value.⁹

§ 441. No action can be maintained for services rendered for a man without his privity or request; as where services are rendered volun-

¹ *Hollinsead v. Mactier*, 12 Wend. 275; *Clark v. Mayor, etc.*, of New York, 3 Barb. 288; 4 N. Y. 338; *Van Buskirk v. Stow*, 42 Barb. 9.

² *Koon v. Greenman*, 7 Wend. 121; *Meyer v. Hallock*, 2 Robt. 284. When the employer orders the work stopped, the contractor may and must stop it. *Goodwin v. Kirker*, 2 Hilton, 401; *Clark v. Marsiglia*, 1 Denio, 317; *Lord v. Thomas*, 64 N. Y. 107, 110; *Parr v. Village of Greenbush*, 112 N. Y. 246.

³ *Barber v. Rose*, 5 Hill, 76; *McKnight v. Dunlop*, 5 N. Y. (1 Seld.) 537, 544; 11 N. Y. 347, 351; *Whitbeck v. Skinner*, 7 Hill, 53.

⁴ *McCullough v. Cox*, 6 Barb. 386; *Willis v. Taggard*, 6 How. Pr. 433; 10 How. Pr. 71; *Eldridge v. Mather*, 2 N. Y. 157; *Gillespie v. Torrence*, 25 N. Y. 306, 309.

⁵ *Bellinger v. Craigue*, 31 Barb. 534.

⁶ *Meehan v. Williams*, 2 Daly, 367; 42 Barb. 9; *Smith v. Gugerty*, 4 Barb. 614.

⁷ *Green v. Haines*, 1 Hilton, 254.

⁸ *Walker v. Millard*, 29 N. Y. 375.

⁹ *Sickels v. Pattison*, 14 Wend. 257.

tarily to preserve a neighbor's house from destruction by fire;¹ or where services are rendered under circumstances which exclude and repel the theory of an implied promise to pay for them.² Measuring the premises and procuring estimates with a view to make an offer to erect a building are not regarded as services rendered on a request.³ Voluntary services rendered by the finder of goods in their preservation are considered meritorious, and ought to be paid for; and it is thought the owner becomes legally bound to pay for them, on taking back the goods thereby preserved.⁴ The law does not imply a contract to pay for board or for services rendered between members of the same family, inasmuch as the relation often exists, and is frequently continued after children come of age, where there is no understanding or expectation of the kind.⁵ The law infers or refuses to imply a contract, according to the actual intention of the parties;⁶ and it gathers the evidence of the intent from the language and conduct of the parties. It infers a contract from a mutual understanding that the services were to be compensated by a legacy or by the devise of a farm.⁷ It does not make, it ascertains and enforces the agreement; and where it appears that the compensation was to be made by will, and none is actually made, the value of the services may be recovered. The implied contract takes effect and form from the circumstances.⁸

§ 442. Under a contract for the manufacture or construction of an article, the work must be done according to the agreement, before the employer can be compelled to accept it; and where he accepts and uses

¹ *Bartholomew v. Jackson*, 20 John. R. 28; *Merritt v. American Dock & Trust Co.*, 36 State Rep. 428.

² *Livingston v. Ackeston*, 5 Cow. 531; *Demyer v. Souzer*, 6 Wend. 436; *Davidson v. Westchester Gas-Light Co.*, 99 N. Y. 558; *McCarthy v. Mayor, etc.*, of N. Y., 96 N. Y. 1.

³ *Topping v. Swords*, 1 E. D. Smith, 609.

⁴ See *Sheldon v. Sherman*, 42 N. Y. 484; *S. C.* 42 Barb. 368; *Redu v. Anderson*, 4 Dana, 193; ante, § 20.

⁵ *Williams v. Hutchinson*, 3 N. Y. 312; *Cropsey v. Sweeney*, 27 Barb. 310; *Robinson v. Cushman*, 2 Denio, 149; *Lunay v. Vantine*, 40 Vt. 501; *Terry v. Bale*, 1 Demarest, 452; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 221; *Carpenter v. Weller*, 15 Hun. 134; *Wilcox v. Wilcox*, 48 Barb. 327; *Lynn v. Smith*, 35 Hun. 275; *Guffin v. First Nat. Bank*, 74 Ill. 259; *Smith v. Johnson*, 45 Iowa, 308; *Windland v. Deeds*, 44 Iowa, 98; *Thorpe v. Bateman*, 37 Mich. 68; *Wells v. Perkins*, 43 Wis. 160.

⁶ *Whiting v. Sullivan*, 7 Mass. 107; *Udike v. Ten Broeck*, 3 Vroom, N. J. 105.

⁷ *Robinson v. Rayner*, 28 N. Y. 494; *Martin v. Wright*, 13 Wend. 460; *Eaton v. Benton*, 2 Hill, 576. See *Davis v. Gallagher*, 55 Hun. 593; *Markey v. Brewster*, 10 Hun, 16; 70 N. Y. 607; *Green v. Roberts*, 47 Barb. 521.

⁸ *Smith v. Velie*, 60 N. Y. 106; *Shakespeare v. Markham*, 10 Hun, 311, 322; *Graham v. Graham*, 34 Pa. St. 475.

it, though unfinished, he must pay for it the stipulated price, after deducting the cost of the work left undone.¹ The article being made under specifications, prescribing the dimensions and structure, and delivered in apparent conformity with the contract, an acceptance of the article without complaint and without any subsequent offer to return it, is conclusive; the employer cannot afterward refuse to pay the purchase money.² Having offered to return the article within a reasonable time, he may recover his damages.³

After a mechanic has finished a carriage for a customer according to his contract, and tendered a delivery of it, he is entitled to recover the price agreed upon; or he may sell it, and recover the difference between the contract price and the actual sale.⁴

§ 443. *Bailments for Services resumed.* Excluding one feature from the contract of bailment for labor and services, namely, the delivery of the goods, the contract is to be enforced like an ordinary agreement; and hence where the property is lost by accident or destroyed by fire, without fault on the part of the bailee, after services have been bestowed upon it, the law allows a recovery for the work done.⁵ It allows a recovery as in other cases disconnected with a bailment; upon the same principles which are applied to an ordinary contract, and subject to the same defenses.⁶ If the work be commenced under a special contract, as repairs upon a vessel under a specific agreement, and the special agreement is departed from as the work proceeds by the mutual consent of the parties, a recovery may be had under the contract as far as it has been performed, and for the new work upon a *quantum meruit*.⁷

§ 444. The bailee for work and services is bound to take reasonable care of the goods or chattels entrusted to him; namely, that care which the nature of the property and the circumstances call for.⁸ And he im-

¹ *Vanderbilt v. Eagle Iron Works*, 25 Wend. 665.

² *Neaffie v. Hart*, 4 Lans. 4; *Howard v. Hoey*, 23 Wend. 350; *Reed v. Randall*, 29 N. Y. 358.

³ *Messmore v. The N. Y. Shot & Lead Co.*, 40 N. Y. 422. As to the nature of the contract, see ante, §§ 411, 412, 413.

⁴ *Bement v. Smith*, 15 Wend. 493; 16 N. Y. 582, 585; *Pollen v. Le Roy*, 30 N. Y. 549; 10 Bosw. 130, 135; 58 Barb. 448.

⁵ *Menetone v. Athawes*, 3 Burr. 1592. A loss by fire or a loss by a violent storm excuses a bailee for hire. *Ames v. Belden*, 17 Barb. 513.

⁶ *Farnsworth v. Garrard*, 1 Campb. 38; *Kuehn v. Wilson*, 15 Wis. 104.

⁷ *Robson v. Godfrey*, 1 Stark. R. 220; *Pepper v. Burland*, Peake N. P. C. 103; *Ellis v. Hamlet*, 3 Taunt. R. 52.

⁸ *Lech v. Maester*, 1 Campb. 138; *Clark v. Earnshaw*, 1 Gow R. 30; *Stewart v. Stone*, 127 N. Y. 500, 505; *Gleason v. Beers*, 59 Vt. 581; *Kelton v. Taylor*, 11 Lea (Tenn.), 264.

pliedly engages to perform the services to be rendered upon them, in a skillful and workmanlike manner. By receiving the goods or chattels to be made or repaired in the line of his business, he is understood to engage that he possesses and will exercise the requisite skill.¹ He cannot recover for unskillful services; and he is liable in damages for his failure to fulfill the contract.²

The skill demanded must be measured by the difficulty and delicacy of the work to be done, because the bailee for hire is bound to apply a degree of skill equal to his undertaking; ³ whether it be to repair a watch or make a telescope. Ordinary skill in the making of delicate instruments of science, music and the higher arts may be, with reference to other branches of industry, a high order of skill; but the standard of skill exacted by the law is that which is common and ordinary in the particular work or business undertaken.

§ 445. Since the obligation to possess and exercise skill springs out of a man's calling, employment or business, it is quite clear that an unskillful man is not liable in damages for his defective work, when employed in a business which he does not follow. The employer knowing his lack of skill, cannot complain of his ill success; ⁴ he falls under the oracular sentence cited from the Mohammedan law: "A man who had a disorder in his eyes called on a farrier for a remedy; and he applied to them a medicine commonly used for *his* patients; the man lost his sight, and brought an action for damages; but the judge said, no action lies, for if the complainant had not been himself an ass, he would never have employed a farrier."⁵ And yet a pretender is liable, where he presses himself into an engagement, or takes upon himself a business of his own wrong, excluding a competent person; ⁶ he is liable for the injury he inflicts where he administers medicine or undertakes an operation upon a servant or child without employment; ⁷ and whether educated or not, he is criminally liable when found guilty of gross rashness in the application of a remedy, and death ensues.⁸

¹ 2 Kent's Comm. 588; 3 Black. Comm. 165; Dale v. See, 51 N. J. L. 378; Keith v. Bliss, 10 Ill. App. 424.

² Denew v. Daverell, 3 Campb. 451; 7 East, 479; ante, §§ 426-430.

³ Cowen's Tr. 70.

⁴ Ritchey v. West, 23 Ill. 385.

⁵ Jones on Bailm. 100.

⁶ Ruddock v. Lowe, 4 F. & F. 519.

⁷ Hook v. Grimes, 13 B. Mon. 188.

⁸ A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art or gross negligence. But when a person undertaking the cure of a disease, whether he has received a medical education or not, is guilty of gross rashness in the application of a remedy, and death

§ 446. Bailees for work and services must use the same care and diligence in keeping the property which prudent and cautious men take of their own. A loss unexplained raises a presumption that it must have occurred through negligence;¹ and a return of goods in a damaged condition, after proof that they were delivered in good order, imposes upon the bailee the burden of proving that he used due and reasonable care of them.² Evidence showing a loss by robbery excuses the bailee;³ but evidence showing simply a loss, or a failure to return the goods, or a theft of them by the bailee's servant, does not of itself excuse; the bailee must exculpate himself by showing that the loss occurred without any want of diligence on his part.⁴ In other words, he must account for the property; he must show that it was lost or injured by causes for which he is not answerable.⁵

§ 447. *Fulfillment of the Contract.* The bailee must fulfill the stipulations of his contract, to the same extent as any other party; and hence his right to recover for services depends upon his performance according to the true intent of the contract. His interest in the property accrues upon such performance, and the contract being entire, his right to recover for his services must ordinarily accrue upon the same implied condition.⁶ So long as the work was in progress, in accordance with the terms of the agreement, the owner retains his title and the bailee his interest and rights under the contract.⁷ A transfer of

ensues in consequence, he is liable to be convicted of manslaughter. *Rex v. John St. John Long*, 4 Carr & Payne, 423; *Rex v. Williamson*, 3 C. & P. 635; *Rex v. Van Butchell*, 3 C. & P. 629. Law shows no favor to quacks: *Rex v. Spriller*, 5 C. & P. 333—case of a corrosive plaster placed on the head of a child; *Rex v. Martin*, 3 C. & P. 211, case of a child killed by giving it gin to drink.

¹ *Cairns v. Robins*, 8 M. & W. 258; *Reeve v. Palmer*, 5 C. B. N. S. 84; *Gleason v. Beers*, 59 Vt. 581; *Taussig v. Schields*, 26 Mo. App. 318; *Fairfax v. New York Cent. & H. R. R. Co.*, 67 N. Y. 11; *Stewart v. Stone*, 127 N. Y. 500, 506.

² *Funkhouser v. Walker*, 62 Ill. 59; ante, § 354; 79 Penn. St. 471.

³ *Walker v. British Guarantee Ass.*, 21 Law J. Q. B. 260; 18 Q. B. 277; *Levy v. Bergeson*, 20 La. Ann. 290, 297.

⁴ *Clark v. Earnshaw*, Gow. 30; *Finucane v. Small*, 1 Esp. 315; 4 Taunt. 787; *Halyard v. Dechelman*, 29 Mo. 459. See *Kelton v. Taylor*, 11 Lea (Tenn.), 264; a case of the unexplained loss of a bale of cotton left by the cotton ginner in an inclosed gin lot containing a house occupied by his hands.

⁵ *Waller v. Parker*, 5 Coldw. (Tenn.) 476; *Hillyard v. Crabtree*, 11 Texas, 264; *Spangler v. Eicholtz*, 25 Ill. 297; *Conwell v. Smith*, 8 Ind. 530; *Gleason v. Beers*, 59 Vt. 581.

⁶ *Pierce v. Schenck*, 3 Hill, 28; *Gregory v. Stryker*, 2 Denio, 628; *Tripp v. Riley*, 15 Barb. 333. He cannot limit or qualify his liability for defective workmanship by a notice given to the owner of the goods at the time of their return, or with the bill for the work done, although the owner accepts the goods with knowledge of the contents of the notice. *Dale v. See*, 51 N. J. L. 378. ⁷ *Mallory v. Willis*, 4 N. Y. 76.

the property by the bailee, made in good faith after a part of the work has been done, does not affect the owner's title; it neither increases nor diminishes his interest in the goods.¹ A transfer to a party acting in bad faith, in fraud of the owner's rights, will not vest any interest in the transferee; and it is adjudged that a wrongful possession of chattels cannot be transmuted into a title of any kind by a process of manufacture.² The intentional wrong-doer does not stand in as favorable a light as an involuntary wrong-doer; the measure of damages against him is more strict.³

When materials are manufactured on shares, the manufacturer's title accrues as against the general owner, on his fulfillment of the contract;⁴ and his special property accrues at once as against third parties.⁵ That is to say, the contract conveys a present interest which may be defended by the bailee against all third parties, and against the owner pending the progress of the work;⁶ and an absolute title to his share when the work is finished.⁷

§ 448. The law allows the bailee for services to hold the goods repaired or manufactured by him, as security for his reasonable charges; it gives him a lien on them which cannot be defeated by the owner or by his creditors.⁸ In one sense the lien arises out of the contract; it is given to the party employed to do the work, and is accessory to the right of compensation for the services; it does not arise in favor of a party employed by the bailee.⁹ And it does not arise against the true owner where the work is done without his knowledge or consent, express or implied.¹⁰

Being called upon for the property, the bailee should at once assert his lien, and give an accurate statement of his charges. A general refusal to surrender the goods, on the bailor's demand, accompanied by a claim that they belong to a third person, is treated as a waiver of

¹ *Hyde v. Cookson*, 21 Barb. 92; *Wood v. Orser*, 25 N. Y. 348.

² *Silbury v. McCoon*, 3 N. Y. 379.

³ *Baker v. Wheeler*, 8 Wend. 505; *Brown v. Sax*, 7 Cowen, 95.

⁴ *Rightmyer v. Raymond*, 12 Wend. 51.

⁵ *Eaton v. Lynde*, 15 Mass. 242.

⁶ *Burdiet v. Murray*, 3 Vt. 302; *Eaton v. Lynde*, 15 Mass. 242.

⁷ *Ante*, §§ 416, 417, 418.

Moore v. Hitchcock, 4 Wend. 292.

⁹ *Hollingworth v. Dow*, 19 Pick. 228; *Eaton v. Lynde*, 15 Mass. 242. The party working on shares may give a third person an interest in his share. *Tripp v. Riley*, 15 Barb. 333; *Putnam v. Wise*, 1 Hill, 234.

¹⁰ *Clark v. Hale*, 34 Conn. 398; *Small v. Robinson*, 69 Me. 425. And see *Sargent v. Usher*, 55 N. H. 287; *Gilson v. Gwinn*, 107 Mass. 126; *Globe Works v. Wright*, 106 Mass. 207.

the lien ; the bailee by such refusal makes himself a party to the controversy, and must stand or fall by the title he asserts.¹ Of course a surrender of the goods to the true owner will protect him against his bailor.²

§ 449. There is no lien under the common law for work done or materials furnished in the erection of an edifice upon real estate. It is the statute which gives the lien and provides the mode in which it may be enforced. The reason of the statute is the same as that which supports the rule giving a bailee a lien for his labor and materials. The remedy is different. The bailee for services has simply to hold the goods as a pledge for the payment of the demand due to him ; while the mechanic or material man must, in order to create a lien for the value of his labor and materials furnished and bestowed in the erection or repair of buildings, follow strictly the provisions of the statute ; and must afterward foreclose his lien in the manner pointed out by the statute. The proceeding has both the advantages and the defects of a statutory remedy³

¹ *Holbrook v. Wight*, 24 Wend. 169; *Everett v. Coffin*, 6 Wend. 603; *Picquet v. McKay*, 6 Blackf. 465. A tender of the amount due discharges the lien; *La Motte v. Archer*, 4 E. D. Smith, 46; the tender must cover the interest, where interest is due; *Heins v. Peine*, 6 Robt. 420.

² *Western Trans. Co. v. Barber*, 56 N. Y. 544, 552; ante, § 353.

³ *Kerby v. Daly*, 45 N. Y. 84; *Beals v. Cong. B'nai Jeshurun*, 1 E. D. Smith, 654, 687; *Blauvelt v. Wordsworth*, 31 N. Y. 285; *Hauptman v. Catlin*, 20 N. Y. 247; *Rolin v. Cross*, 45 N. Y. 766.

CHAPTER VII.

OF INNKEEPERS.

§ 450. Any one who makes it his business to entertain travelers and passengers, and provide lodging and necessities for them, their horses and attendants, is a common innkeeper; and it is no way material whether he have a sign before his door or not.¹ The keeping of an inn is not a franchise, but a lawful trade open to every person.² The business is regulated by statute, and it has been treated in this State as a franchise only where there has been granted to the innkeeper the privilege of selling strong and spirituous liquors and wines to be drank in his house. The license is required as a mode of regulating the sale of liquors to be used as a beverage, and where no such sale is intended there is no need of any license.³

§ 451. In regard to these licenses, which are but incidentally connected with our subject, precisely as the retail of spirituous liquors is but an incident to the business of an innkeeper, it is to be noticed that they are granted by the authority of a positive law, and derive their value from the fact that all other sales, less than a given quantity, are by the same law prohibited. The license confers a franchise; and the prohibitions of the statute convert the franchise into a monopoly. The State acts on the theory that it is under an obligation to restrain the evils likely to flow from an unlimited traffic in spirituous liquors; and provides by law that the retail sale shall be made discreetly, by men carefully chosen for that purpose, on account of their good moral character. All other sales it prohibits under severe penalties, and renders

¹ Bac. Abr. tit. Inns and Innkeepers, B.; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179; *Mowers v. Fethers*, 61 N. Y. 34, 37.

² *Overseers, etc., of Crown Point v. Warner*, 3 Hill, 150; *People v. Murphey*, 5 Parker Cr. 130.

³ *Mayor, etc., of New York v. Mason*, 4 E. D. Smith, 142; *The People v. Jones*, 54 Barb. 311. The rule is different in some of the States; *Curtis v. Ohio*, 5 Ham. R. 324. An unlicensed house at which transient guests and regular boarders are entertained is an inn. *Foster v. State*, 84 Ala. 451; *Attwater v. Sawyer*, 76 Me. 539. By applying for and obtaining a license to sell intoxicating liquors as a hotel-keeper, the licensee may subject himself to the common law liabilities of an innkeeper, where but for the license he might deny the keeping of a hotel. *Kopper v. Willis*, 9 Daly, 460.

them illegal.¹ It allows no action on the contract;² or by the payee on a note given for the purchase money.³ It prohibits sales to any child actually or apparently under the age of sixteen years, or to any intoxicated person, pauper, habitual drunkard, or Indian, or to any person to whom the licensee may be forbidden to sell by a notice in writing from the parent, guardian, husband, wife or child of such person;⁴ and in several of our States the statute renders the seller, as well as the owner of the premises occupied by him, liable in damages resulting to the employer or to any member of the family of the person who becomes intoxicated by the licensed sale of liquors to him? liable to the extent of the damages suffered by the sale of the liquors causing the intoxication, and the consequent damages. The intent of the statute apparently is, to make it the interest of the seller to prevent his customers from drinking to intoxication; or to stimulate him in his duty to sell with discretion.⁵ And it is adjudged that the license to sell at retail does not so far render the sale legal as to prevent the seller's being held liable for an abuse of his privilege; and for damages quite remote from the negligent sale.⁶

§ 452. A license to sell liquors at retail will protect an agent or clerk actually making the sale; but no one can excuse himself from liability by showing that he acted as a clerk of an unlicensed person, in a sale.⁷ The license to sell is a personal trust, and cannot be assigned to another; hence one who purchases a tavern and receives from the grantor permission to sell under his license, cannot continue the business of selling and defend himself against an action to recover the penalty for selling liquors without a license, by proving such permission.⁸

¹ *Griffith v. Wells*, 3 Denio, 227; *Board of Excise of Ont. Co. v. Garlinghouse*, 45 N. Y. 249.

² *Best v. Bauder*, 29 How. Pr. 489. *Laws of 1892*, Chap. 401, § 40.

³ *Coburn v. Odell*, 10 Foster N. H. 540; *Perkins v. Cummings*, 2 Gray, 258; *Hubbell v. Flint*, 13 Gray, 277. All securities given for any debt contracted for the purchase of intoxicating liquor on credit are void. *Laws of 1892*, Chap. 401, § 40.

⁴ *Laws of 1892*, Chap. 401, § 32.

⁵ The Civil Damage Act was adopted in this State in 1873. It is entitled, "An Act to Suppress Intemperance, Pauperism and Crime." Ch. 646. It has to a considerable extent been modified by subsequent legislation although not expressly repealed. *Laws of 1892*, Chap. 401, § 40; *id.* Chap. 403, § 2.

⁶ *Baker v. Pope*, 5 N. Y. Sup. Ct. 102; *Jackson v. Brookins*, 12 N. Y. Sup. Ct. 530, 332; *Hayes v. Phelan*, 11 N. Y. Sup. Ct. 733; *Schneider v. Hosier*, 21 Ohio St. 98; 33 Wis. 107, 154, 570; *Chicago Legal News*, Aug. 1, 1874; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Neu v. McKechnie*, 95 N. Y. 632; *Mead v. Stratton*, 87 N. Y. 493; *Davis v. Standish*, 26 Hun, 608.

⁷ *Board of Excise v. Dougherty*, 55 Barb. 332. A husband is liable for a penalty incurred by the wife's sale; *Coms. of Excise v. Keller*, 20 How. Pr. 280.

⁸ *Alger v. Weston*, 14 John. R. 231.

Under the statutes of this State, when a justice of the peace becomes an innholder or a tavern-keeper, he is thereby disqualified from commencing any new civil business as a justice; and *being* a tavern-keeper and licensed to sell, he is held eligible to the office; as the court said in one case, the statute "left it open to the people of the town, if such be their will, to have rum and justice dispensed at the same place and by the same hand."¹ By a subsequent amendment, this freedom is taken from the people. A tavern-keeper cannot now exercise the civil jurisdiction of a justice of the peace.²

There is also another provision of our statutes, which deserves to be noticed, prohibiting an innholder or tavern-keeper from recovering the purchase price of any sale on credit of any strong or spirituous liquors, wine, ale, or beer, to be drunk on the premises where sold. Such debts cannot be recovered; and all securities given for them are declared void.³

§ 453. The words *hotel* and *inn* have very nearly the same history, and still retain in literature some touch of sentiment derived from their original sense; they have a suggestive sense which does not belong to the word *tavern*; and yet these several words are now often used interchangeably, as synonymous terms.⁴ The keeper of a tavern has the same rights and is under the same liabilities as an innkeeper, where he

¹ *Parmalee v. Thompson*, 7 Hill, 77.

² *Rice v. Milks*, 7 Barb. 337; *Clayton v. Per Dun*, 13 Johns. 219; Code of Civil Procedure, § 2866.

³ Laws of 1892; Chap. 401, § 40.

⁴ *Overseers, etc., of Crown Point v. Warner*, 3 Hill, 150; *Wortham v. Comm'th*, 5 Rand. 669; *Linkous v. Comm'th*, 9 Leigh's R. 608; *Cromwell v. Stephens*, 2 Daly, 15. Hotels and inns have a parallel history; in France the hotel was at an early day the palace or dwelling-house of a prince or lord, in which he was accustomed to entertain travelers and strangers; and the inn in England seems to have been originally the town-house of a nobleman, bishop or other distinguished personage, in which he resided and entertained his followers, when he attended court; thus Warwick, the king-maker, whilst he resided in London, a city which he loved and courted, kept open house for the humbler sort of people, and free board for all comers, roasted six oxen for every meal, so that each guest might carry off as much meat with him as he could stick upon a large dagger; and such was his hospitality, that it was a saying current in his time, that thirty thousand men were fed by him on his various domains and in his numerous castles. As the commons grew in importance, common inns took the place of ducal and baronial halls, till by degrees the hospitable monastery and the castle of the nobleman were no longer frequented by the traveler, as a place of entertainment and rest on his journey; so that finally the old hospitality was superseded by the age of commerce and civil freedom. Gray's Inn and Lincoln's Inn, designating, it is said, the residence of the families whose names they bear, are still left as a kind of fossil history of the old time, and origin of our public houses. (2 Michelet's History of France, 319; Webster's Dictionary.)

furnishes beds, provisions and entertainment for all persons paying for the same, without furnishing accommodations for carriages and horses.¹ So is the keeper of a hotel, who furnishes the same accommodations with the same exception;² and the rule is the same where he keeps a hotel on the European plan, providing his guests with lodgings for uncertain periods and keeping a refectory on the premises where they may at their option take their meals, and pay for them, then and there.³ It is the business which fixes the character of the house: a man is liable as an innkeeper, where he keeps a house for the reception and entertainment of all comers, but more especially for the accommodation of a class known as emigrants, guests entertained from day to day.⁴ He does not become thus liable where he merely keeps a restaurant; or where he keeps both a public house and a restaurant, and merely receives a person at a table for a meal.⁵ And he does become liable as an innkeeper, where he receives lodgers and furnishes them with meals, without any previous agreement as to the duration of their stay or the terms of their entertainment.⁶

§ 454. The keeper of a coffee-house, a boarding-house or lodging-house is not an innkeeper, because he does not keep a public house of general entertainment for all who choose to visit it; and does not enter upon the business of keeping a common inn.⁷ Where he really keeps an inn, though under the name of a coffee-house, and conducts his business as an innkeeper, he is liable in that capacity;⁸ and he is not so liable where he simply receives lodgers and boards them under special contracts for a limited time, or where he simply lets rooms by the day or the week, and does not otherwise provide for their entertainment.⁹

§ 455. *Who are Guests?* The answer to this question generally determines in whose favor an action may be maintained against an innkeeper. A stranger, a traveler, and all persons entertained at a common

¹ Thompson v. Lacy, 3 Barn. & Ald. 283.

² Jones v. Osborn, 2 Chitty R. 484.

³ Krohn v. Sweeney, 2 Daly, 200. See Kopper v. Willis, 9 Daly, 460; Korn v. Schedler, 11 Daly, 234.

⁴ Willard v. Rheinhardt, 2 E. D. Smith, 148.

⁵ Carpenter v. Taylor, 1 Hilton, 193. See Kopper v. Willis, 9 Daly, 460; Korn v. Schedler, 11 Daly, 234. A person may let the upper rooms of a building to lodgers, and lease the lower rooms to the keeper of a restaurant without acquiring the rights of an innkeeper. Cochran v. Schryver, 12 Daly, 17.

⁶ Wintermute v. Clarke, 5 Sandf. 242; Taylor v. Monnot, 4 Duer, 116.

⁷ Doe v. Lansing, 4 Campb. R. 77; Calye's Case, 8 Co. R. 32; Dausey v. Richardson, 2 Ellis & Black. 144.

⁸ Thompson v. Lacy, 3 Barn. & Ald. 283; 2 Daly, 15; Smith v. Scott, 9 Bing. 14; 2 Moo. & S. 35.

⁹ Cromwell v. Stephens, 2 Daly, 15; Parkhurst v. Foster, 1 Salk. 387; 5 Sandf. 242.

inn, tavern, or hotel, are deemed guests; and on that account entitled to hold the innkeeper to his strict common law liability.¹

It appears from the original writ used against an innkeeper, which was the foundation of the common law on this subject, that the common inn was instituted for passengers and wayfaring men, being termed *diversorium*, because he who lodges there is *quasi divertens se a via*; and hence a neighbor who lodges with the innkeeper as a friend, is not deemed a guest.² The writ was founded on the custom of the realm, according to the tenor of which the keeper of an inn for the entertainment of travelers, was bound to take care of the goods and chattels of his guest, within his inn, without loss or damage, so that no injury should arise by any means through his default, or that of his servants.³ The action against the innkeeper was not, however, confined to the guest himself; for it was early held that a master may maintain an action against an innkeeper, on the general custom, for money lost while his servant was the innkeeper's guest;⁴ and for goods lost under the same circumstances.⁵ In more recent cases, it is adjudged that the owner may recover for goods entrusted by his servant, as a guest, to an innkeeper;⁶ and also, where the servant was robbed of his master's money, though the master was a corporation that could not in fact be the guest of an innkeeper.⁷ An agent or friend, being a bailee of the money or goods, may also maintain an action for them.⁸ And a bailee

¹ Bac. Abr. tit. Inns and Innkeepers, c. 5, 6.

² Calye's Case, 8 Rep. 32. In a recent case it was held that a guest is a traveler or transient person who puts up at an inn for a lawful purpose; and that a neighbor who registers a prostitute as his wife and occupies a chamber with her, is not a guest. *Curtis v. Murphy*, 63 Wis. 4. A person who goes to a hotel and dines at the invitation and at the expense of a guest of the house, is not himself a guest. *Gastenhof v. Clair*, 10 Daly, 265.

³ *Bedle v. Morris*, Cro Jac. 224; *Cross v. Andrews*, Cro. Eliz. 622.

⁴ *Bedle v. Morris*, Cro. Jac. 224.

⁵ *Bennett v. Mellor*, 5 Term. R. 273; *Piper v. Manney*, 21 Wend, 282; *Needles v. Howard*, 1 E. D. Smith, 54.

⁶ *Mason v. Thompson*, 8 Pick. R. 280.

⁷ *Towson v. The Havre de Grace Bank*, 6 Harr. and John. 47; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417, 424. Where an agent or servant of a corporation, in its employment, becomes the guest of an innkeeper and is robbed of his principal's money, the principal is entitled to recover on the same ground and under the same rule of law, as though he or it were the guest. In *Bedle v. Morris*, Yelv. 162, the court say: "And moreover it is not material whether he was his servant or not; for if it was his friend by whom the party sent the money, and he is robbed in the inn, the owner shall have the action." *S. C. Cro. Jac. 224*. The innkeeper's liability for money lost in his house is not limited to sums necessary and designed for ordinary traveling expenses.

⁸ *Kellogg v. Sweeney*, 1 Lansing, 397.

of the goods for hire, is the only person entitled to hold the innkeeper under the strict rule of the common law.¹ He is the party in possession.

§ 456. It is a question of fact whether or not a man is to be deemed a guest, in the legal sense of that term, where he sojourns for some time in a house which is kept both as a boarding-house, and as a common inn for transient guests. He is to be deemed a guest, though he eats at the table set for the weekly boarders, where he is not notified of the usage of the house.² Received as a boarder, he cannot be treated as a guest; he is not subject to the liabilities, nor is he entitled to the protection of a traveler.³ Being received as a guest, and being in reality a traveler, he does not lose his relation or rights, by making a contract for his board by the week.⁴ And yet it is quite evident that he must cease to be a guest where he sojourns for a definite period or for a season in a public house, under a special agreement defining his accommodations and fixing the price of his board, as with ordinary boarders. Mere lapse of time will not have the same effect, nor will the fact that the traveler has reached the end of his journey and is no longer a way-faring man. The circumstances, the duration of the sojourn, and the nature of the contract, are to be considered.⁵

§ 457. The attendants at an evening ball given at an inn, are not travelers, and they are not guests, where the innkeeper by an agreement with a company furnishes rooms and supper for a certain price, and tickets are issued and sold at so much each, to the members and friends of the company. The special contract creates a new and different relation from that which ordinarily arises between the innkeeper and his guest.⁶

When a special agreement is made with an innkeeper, specifying the accommodations to be furnished, and the terms for certain days in the week, in the prosecution of a special business, the relation is not that of innkeeper and guest.⁷ The relation is also modified when the agreement transfers the innkeeper's duty to the guest; as where the

¹ *Coykendall v. Eaton*, 55 Barb. 188; 37 How. Pr. 438; 40 How. Pr. 266.

² *Hall v. Pike*, 100 Mass. 495.

³ *Chamberlain v. Masterson*, 26 Ala. 371; *Ewart v. Stark*, 8 Rich. 423.

⁴ *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417, 423; *Pinkerton v. Woodward*, 33 Cal. 557; *Norcross v. Norcross*, 53 Maine, 163; *Hancock v. Rand*, 94 N. Y. 1; *Ross v. Mellin*, 36 Minn. 421; *Beal v. Posey*, 72 Ala. 323.

⁵ *Bacon's Abr.*, tit. Inns and Innkeepers, c. 5 and 6; *Roll. Abr.* 3; *Mowers v. Fethers*, 61 N. Y. 34. See *Moore v. Long Beach Development Co.*, 87 Cal. 483.

⁶ *Carter v. Hobbs*, 12 Mich. 52; *Fitch v. Casler*, 17 Hun, 126.

⁷ *Washburn v. Jones*, 14 Barb. 193; distinguished in *Mowers v. Fethers*, 61 N. Y. 34; 6 Lansing, 112, reversed.

latter hires a room for the purpose of exhibiting and selling goods, and takes the key and with it the personal care of his property.¹

§ 458. A person becomes a guest by entering an inn and obtaining refreshments of any kind; as where he purchases liquors, and lays down goods or parcels by his side, or deposits them in the proper place while he stops. A formal delivery of the goods to the innkeeper is not required.² Having become a guest, the relation continues until it is severed by some act showing an intention to leave without returning.³ *E. g.*, if a traveler, having become a guest at an inn, leave his horse there and go out to dine or lodge with a friend, he does not thereby cease to be a guest; and the better opinion is that he is to be deemed a guest, where he leaves the inn to go to another town to be absent some days, leaving behind property for the care and keeping of which the host is to receive a compensation.⁴ But a man does not become a guest, by sending his horse to an inn to be kept at his expense.⁵ And where being a guest, he pays his bill and leaves an inn, permitting his baggage to remain, the relation ceases, and with it the innkeeper's liability; so that for any subsequent loss he is answerable only as an ordinary bailee.⁶

The innkeeper's liability commences as soon as a traveler takes a

¹ *Burgess v. Clements*, 4 Maule & Selw. 306. In this case the guest obtained a private room in an inn, selected by himself for the purpose of exhibiting to his customers his goods, jewelry, and was permitted to take the key that he might lock the door when he went out. Omitting to do this the goods were stolen; and it was left to the jury to determine whether under the circumstances of the case the plaintiff had not discharged the defendant, or assumed the care of his own property, and held well submitted. In *Mowers v. Fethers*, supra, the owner of a stallion hired a stall for him on certain days of the week and board for his keeper, and the latter took care of the horse and kept the key of the stable; and it was held that the relation of innkeeper and guest did not arise.

² *Bennett v. Mellor*, 5 Term R. 273; *McDonald v. Edgerton*, 5 Barb. 560; *Clute v. Wiggins*, 14 John. R. 175; *Peet v. McGraw*, 25 Wend. 653.

³ *McDaniels v. Robinson*, 26 Vt. 316; 5 Sandf. 242.

⁴ *Yorke v. Grindstone*, 1 Salk. 388; 2 Ld. Raym. 866; *Gelley v. Clark*, Cro. Jac. 188; *Murray v. Clarke*, 2 Daly, 102; *Allen v. Smith*, 12 Com. Bench, N. S. 638; 104 Eng. Com. L.

⁵ *Grinnell v. Cook*, 3 Hill, 485; *Ingallsbee v. Wood*, 36 Barb. 452; S. C. 33 N. Y. 577; *Daniels v. Robinson*, 28 Vt. 387; *Healey v. Gray*, 68 Me. 489. A pedler who goes to a hotel and without calling for a room, or obtaining food or drink, leaves his pack in the storeroom with the consent of the innkeeper, does not become a guest. *Toub v. Schmidt*, 60 Hun, 409.

⁶ *Miller v. Peeples*, 60 Miss. 819; *O'Brien v. Vail*, 22 Fla. 627; *Wintermute v. Clarke*, 5 Sandf. 242; 42 How. Pr. 378; where a guest takes and pays for his room for the day, and his baggage is to be sent to a boat at evening, the relation continues. *Giles v. Fauntleroy*, 13 Md. 126

carriage provided by the innkeeper to carry guests to and from the cars.¹ And where a man comes to an inn and leaves his goods and horses, and goes into the town saying that he will return at night, and afterwards returns, his goods having been in the mean time stolen; he has his remedy against the innkeeper. He is a guest in such a sense that he is entitled to recover the value of the lost goods.²

§ 459. *Delivery to an Innkeeper.* It is not usual, and it is not necessary that the goods of a guest should be placed in the special custody of the innkeeper. Bringing or placing them *infra hospitium*, is sufficient to charge him with their safe keeping. We have many illustrations of this rule in the reported cases; as where a sleigh loaded with wheat was put into the innkeeper's wagon-house, where it was usual for him to receive loads of that description;³ or where a gig on a fair day was received and placed in the open street outside of the yard;⁴ or where a loaded sleigh is placed in a yard not enclosed, by the direction of the innkeeper's servant;⁵ or where, at the suggestion of a guest, his luggage was taken into the commercial room;⁶ or where a lady's reticule with money in it, was left for a few minutes on a bed, in her room;⁷ in each of these cases the property was stolen, and the innkeeper was held liable for it.

The innkeeper has under the common law a right to prescribe the manner in which the goods or baggage of a guest shall be stored:⁸ and hence he is liable, where the goods are deposited, placed or secured under his direction or that of his servant or agent.⁹ He is liable for the goods brought into the inn or within the curtilage, in the usual manner, and for all property delivered into his custody; he is liable as an innkeeper for the property of a guest, thus brought *infra hospitium*.¹⁰ He is not so liable where the guest himself chooses the place of deposit, and does not request the innkeeper to assume the custody of the prop-

¹ Dickinson v. Winchester, 4 Cush. 115; Coskery v. Nagle, 83 Ga. 696; Sasseen v. Clark, 37 Ga. 242.

² Walbroke v. Griffith, Moor, 877.

³ Clute v. Wiggins, 14 John. R. 175.

⁴ Jones v. Tyler, 1 Adol. & Ellis, 522.

⁵ Piper v. Mauny, 21 Wend. 282.

⁶ Richmond v. Smith, 8 Barn. & Cres. 9.

⁷ Kent v. Shuchard, 2 Barn. & Adol. 803.

⁸ Wilson v. Halpin, 1 Daly, 496; 30 How. Pr. 124; Van Wyck v. Howard, 12 How. Pr. 147.

⁹ Shoecraft v. Bailey, 25 Iowa, 553; 33 Cal. 557. See Johnson v. Richardson, 17 Ill. 302; Pope v. Hall, 14 La. Ann. 324, 524.

¹⁰ Packard v. Northcraft, 2 Metc. (Ky.) 439; Norcross v. Norcross, 53 Me. 163; Burrows v. Triesber, 21 Md. 320.

erty; ¹ or where the guest delivers his horse, cattle or sheep to the innkeeper and directs them to be turned out to pasture. He is not liable in such cases for a loss by theft; he does not insure the safety of the property.²

§ 460. The usages of travel, together with the vast variety of goods, parcels and baggage which are customarily carried by travelers, are to be considered in determining what circumstances will charge the innkeeper with the care of property coming to his house. Horses and carriages are 'properly entrusted to the hostler; ³ and parcels to the agent or servant accustomed to receive them; ⁴ while articles of wearing apparel may be delivered or deposited, or hung up in the usual place and manner.⁵ If a traveler, as he alights from a car, delivers a check to the servant of an innkeeper for a valise containing money, he is himself bound to use some care to see that it is brought in; ⁶ and in having it deposited in the proper place; ⁷ independent of the statute he is not obliged to disclose the contents of a portmanteau, a valise, or a pocket-book; it is sufficient to deliver them as valuable parcels, or even like ordinary baggage.⁸ It is for the innkeeper to ascertain values, and give directions in respect to the place of deposit: ⁹ and it is clearly the duty of the guest to give him, on request, such reliable information in regard to the value of a package or parcel as will enable him to take proper care of it.¹⁰

§ 461. In England and in many of our States the mode of delivering or depositing valuable parcels with the innkeeper is now regulated by

¹ *Albin v. Presby*, 8 N. H. 408; *Wilson v. Halpin*, 1 Daly, 496.

² *Hawley v. Smith*, 25 Wend. 642; *Neal v. Wilcox*, 4 Jones, N. C. Law, 146.

³ *Hallenbake v. Fish*, 8 Wend. 547; *Seymour v. Cook*, 55 Barb. 451.

⁴ *Needles v. Howard*, 1 E. D. Smith, 54; *Cairns v. Robins*, 8 Mees. and Wels. 258.

⁵ *Pinkerton v. Woodward*, 33 Cal. 557; *McDonald v. Edgerton*, 5 Barb. 560; *Candy v. Spencer*, 3 F. & F. 306. See *Johnson v. Richardson*, 17 Ill. 302; *Profflet v. Hall*, 14 La. Ann. 524; *Reed v. Amidon*, 41 Vt. 15.

⁶ *Fowler v. Dorlon*, 24 Barb. 384.

⁷ *Purvis v. Coleman*, 21 N. Y. 111.

⁸ In *Shoecraft v. Bailey*, 25 Iowa, 553, a pocket-book was delivered without stating its contents. In *Quinton v. Courtney*, 1 Hayw. N. C. Rep. 41, saddle-bags containing money were carried into the bar-room, without notice that they contained money. And in *Kellogg v. Sweeny*, 1 Lans. R. 397, S. C. 46 N. Y. 291, the plaintiff delivered a satchel containing gold coin to the clerk of the innkeeper, informing him that it contained property of value; and in each of these, as in other cases, the innkeeper was held liable for the loss of the money, it being stolen.

⁹ *Richmond v. Smith*, 2 M. and R. 235; 3 B. and C. 9; *Sanders v. Spencer*, *Dyer*, 266.

¹⁰ This rule is assumed in construing the statute modifying the common law. *Wilkins v. Earle*, 19 Abbott Pr. 190; 3 Robt. 352; 44 N. Y. 172; *Bendetson v. French*, 44 Barb. 31; 46 N. Y. 266.

statute. In this State, money, jewels and ornaments must be entrusted to the proprietor or keeper of the house; provided he shall furnish a safe to keep them in and post a notice to that effect in a conspicuous manner in the room occupied by the guest. As these statutes bear upon the liability of the hotel or innkeeper, it will be proper to consider them in that connection.¹

§ 462. *Responsibility of Innkeepers at common law.* The keeper of an inn or hotel is liable for the loss of the goods of his guest committed to his care, unless the loss is caused by the act of God, by the common enemy, or by the neglect or default of the guest. On proof of the loss, the innkeeper is *prima facie* liable.²

The rule is strict, and it is reasonable; it was established in a period when theft and robbery were quite frequent, and innkeepers were thought to have many opportunities and some temptations to combine and connive with ruffians and outlaws in the plunder of strangers; and the rule has been continued in more modern times, on grounds of public utility and convenience. The guest, being a stranger, rarely has the means of proving how his property was lost or injured;³ and so the law holds the innkeeper responsible for the goods entrusted to him, on the same ground as it holds the common carrier answerable for the goods he receives.⁴

There is in Holinshed's Chronicles a description of the inns of England, from which it will be easy to perceive the reason of the law establishing the duties and responsibilities of the innkeeper. The habits and morals of a people are always important to be considered in the study of a law of this kind, confessedly based upon public policy, and designed for the benefit and convenience of the community. The effect of the rule holding the goodman of the house responsible for all losses occurring in his inn, is such that even in a house frequented by robbers, and served by thieves, the chronicler tells us you shall not hear that a man has been robbed in an inn. Though entirely unintentional, this is very

¹ Laws of 1892, Chap. 284; 26 and 27 Vict., Ch. 41; 3 Fisher's Com. Law Digest, 4689.

² Hill v. Owen, 5 Blackf. R. 323; Mason v. Thompson, 9 Pick. R. 280; Van Wyck v. Howard, 12 How. Pr. 147; Cheesbrough v. Taylor, 12 Abbott Pr. 227; Murray v. Clarke, 2 Daly, 102; Dembier v. Day, 12 Neb. 596; Norcross v. Norcross, 53 Me. 163; Burbank v. Chapin, 140 Mass. 123; Russell v. Fagan, 8 East. Rep'r (Del.), 828; Wilkins v. Earl, 44 N. Y. 172. By the Georgia Code, § 2120, it is provided that in case of loss the presumption is want of proper diligence in the landlord. See Murchison v. Sergeant, 69 Ga. 206. And see Cal. Civil Code, § 1859.

³ Bennett v. Mellor, 5 T. R. 273; 14 John. R. 177; Jones on Bailm. 95, 96; Wilkins v. Earl, 19 Abb. Pr. 190; 3 Robt. 352; 44 N. Y. 172.

⁴ Orange Co. Bank v. Brown, 9 Wend. R. 85, 114.

high testimony to the wisdom of the law, showing at once its general utility and the circumstances in which it originated.¹

¹ The description referred to in the text is as follows: "Those townes that we call thorowfares have great and sumptuous innes builded in them, for the receiving of such travellers and strangers as pass to and fro. The manner of harbouring therein is not like that of some other countries, in which the host or goodman of the house doth challenge a lordlie authoritie over his guests, but cleane otherwise, sith everie man may use his inne as his owne house in England, and have for his monie how great or little varietie of vittels, and what other service himselfe shall think expedient to call for. Our innes are also very well furnished with naperie, bedding, and tapesterie, especialie with naperie: for beside the linnen used at the tables which is commonlie washed dailie, is such and so much as belongeth unto the estate and calling of the guest. The commer is sure to lie in cleane sheets, wherein no man hath beene lodged since they came from the landresse, or out of the water wherein they were last washed. If the traveller have an horsse, his bed doth cost him nothing, but if he go on foot he is sure to paie a pennie for the same: but whether he be horsseman or footman if his chamber be once appointed he may carrie the kaie with him, as of his owne house, so long as he lodgeth there. If he loose oughts whilest he abideth in the inne, the host is bound by a generall custome to restore the damage, so that there is no greater securitie anie where for travellers than in the greatest innes of England. Their horssees in like sort are walked, dressed and looked unto by certeine hostelers or hired servants, appointed at the charges of the goodman of the house, who in hope of extraordinarie reward will deal verie diligentlie after outward appearance in this their function and calling. Herein neverthesse are manie of them blameworthy, in that they do not onlie deceive the beast oftentimes of his allowance by sundrie meanes, except their owners looke well to them; but also make such packs with slipper merchants which hunt after preie (for what place is sure from evil and wicked persons) that manie an honest man is spoiled of his goods as he travelleth to and fro, in which feat also the counsell of the tapsters or drawers of drinke, and chamberleins is not seldome behind or wanting. Certes I beleve not that chapman or traveller in England is robbed by the waie without the knowledge of some of them, for when he cometh into the inne, and alighteth from his horsse, the hostler forthwith is verie busie to take downe his budget or capcase in the yard from his saddle bow, which he peiseth in his hand to feel the weight thereof: or if he misse of this pitch, when the guest hath taken up his chamber, the chamberleine that looketh to the making of the beds, will be sure to remove it from the place where the owner hath set it as if it were to set it more convenientlie some where else, whereby he getteth an inkling whether it be monie or other short wares, and thereof giveth warning to such od ghests as hant the house and are of his confederacie, to the utter undoing of manie an honest yeoman as he journeth by the waie. The tapster in like sort for his part doth marke his behaviour, and what plentie of monie he draweth when he paieth the shot, to the like end: so that it shall be an hard matter to escape all their subtile practices. Some thinke it a gay matter to commit their budgets at their comming to the goodman of the house: but thereby they oft bewraie themselves. For albeit their monie be safe for the time that it is in his hands (for you shall not hear that a man is robbed in his inne) yet after their departure the host can make no warrantise of the same, sith his protection extendeth no further than the gate of his owne house: and there cannot be a surer token unto such as prie and watch for those booties, than to see anie ghest deliver his capcase in such manner. In all our innes we have plenty of ale, beere, and sundrie

§ 463. From an early day and by the general custom, innkeepers are obliged to keep the goods and chattels of their guests without subtraction or loss day and night, so that no damage shall come to them from the negligence of the innkeeper or his servants. The obligation is very broad; they are bound to keep the goods in safety, and are liable for losses by either negligence or theft.¹ The form of the action against an innkeeper, and the averments in the plaintiff's complaint assume that his liability is grounded on his negligence or breach of duty;² and as a deduction from this postulate, we have some indications holding that he is not liable where the loss does not arise through his negligence;³ nor for money retained by the guest in his own keeping, exceeding the amount necessary for traveling expenses:⁴ and some rulings

kinds of wine, and such is the capacite of some of them that they are able to lodge two hundred or three hundred persons, and their horssees at ease, and thereto with a verie short warning make such provision for their diet, as to him that is unacquainted withall may seeme to be incredible. Howbeit of all in England there are no worse innes than in London, and yet manie are there far better than the best that I have heard of in anie foren countrie, if all circumstances be dulle considered. But to leave this and go in hand with my purpose. I will here set downe a table of the best thorowfares and townes of greatest travell of England, in some of which there are twelve or thirteene such innes at the least, as I before did speake of. And it is a world to see how ech owner of them contendeth with other for goodnesse of intertainment of their guests, as about finesse and change of linnen, furniture of bedding, beautie of rooms, service at the table, costlinesse of plate, strength of drinke, varietie of wines, or well (being) of horssees. Finallie there is not so much omitted among them as the gorgeounsnes of their verie signes at their doores, wherein some do consume thirtie or fortie pounds, a meere vanitie in mine opinion, but so vaine will they needs be, and that not onlie to give some outward token of the inne keepers welth, but also to procure good ghests to the frequenting of their houses in hope there to be well used."

Here follows a table of "waies or thorowfares" with distance. These chronicles come down to the reign of Elizabeth, and this description of the inns of England, given in the very words of the quaint old writer, is to be understood as applying to about that period. "Of our Innes and Thorowfares," 2 Holingshed's Chronicle, Ch. 16, page 246. See Macaulay's History of England, Vol. I. pages 357, 358; and Wilkins v. Earle, 4 Am. Law Reg. N. S. 472; 3 Robt. 352; 19 Abbott Pr. 190; 44 N. Y. 172.

¹ Dawson v. Chawney, 5 Adolph. & Ellis, N. R. 164; Clute v. Wiggins, 14 John. R. 175; ante, §§ 459, 460; Shaw v. Berry, 31 Maine, 478; Rubenstein v. Cruikshank, 54 Mich. 199.

² Moak's Van Santvoord's Pl. 218, 219; Chitty Pl. 307.

³ Merritt v. Claghorn, 23 Vt. 177; McDaniels v. Robinson, 26 Vt. 316; Metcalf v. Hess, 14 Ill. 129; Kisten v. Hildebrand, 9 B. Mon. 72; Laird v. Eichold, 10 Ind. 212.

⁴ Simon v. Miller, 7 La. Ann. R. 360; Johnson v. Richardson, 17 Ill. 302; Maltby v. Chapman, 25 Md. 269, 307; Wilkins v. Earle, 3 Robt. R. 352, overruled by Court of Appeals, 44 N. Y. 172. That the liability of the innkeeper is not limited to the sum needed for traveling expenses, see Smith v. Wilson, 36 Minn. 334.

exempting the innkeeper from liability for losses arising from burglary, or from fire, without any negligence on his part.¹ But the current of authorities under the common law is somewhat more strict: it holds the innkeeper liable for losses by thefts, whether committed by his servants, the domestics within the house, or by parties from without;² it holds him liable for losses by robbery and violence, and for those which are unexplained; also for those which are attributable to other guests.³

The innkeeper is bound to use extraordinary diligence in preserving and returning the goods of his guest; he is liable under the same strict rule as a common carrier; he insures the safety of the property entrusted to him, and is liable for it under the common law, unless it is proved that the loss of it is attributable to the negligence or fraud of the guest, or to the act of God or the public enemy. This appears to be the prevailing rule of the common law, where it is not modified by statute.⁴ A sense of the severity of this rule appears in many of our decisions, and has resulted in various modifications by the statute law.⁵

¹ *McDaniels v. Robinson*, *supra*; *Merritt v. Claghorn*, *supra*; *Cutler v. Bonney*, 30 Mich. 259.

² *Filipowski v. Merriweather*, 2 F. & F. 285; *Shoecraft v. Bailey*, 25 Iowa, 553; *Houser v. Tully*, 62 Pa. St. 92.

³ *Gile v. Libby*, 36 Barb. 70; 33 N. Y. 574; *Hallenbake v. Fish*, 8 Wend. 547; *Mason v. Thompson*, 9 Pick. 280; *Pinkerton v. Woodward*, 33 Cal. 557. The defense in this case was that the defendant's clerk was feloniously knocked down, and the key of the safe taken from him by violence, and the safe (containing plaintiff's property, gold dust) opened and robbed by certain evil disposed persons, who carried away plaintiff's purse or package—and it was held no defense. See *Woodworth v. Morse*, 18 La. Ann. 156. In *Woodward v. Birch*, 4 Bush (Ky.), 510, there was proof on the part of the defendant tending to show a robbery of the safe during the night, with proof on the part of the plaintiff that a discharged clerk of the defendant had in his possession a key to the lock of the safe; and it was held that the defendant was liable, notwithstanding he told the guest when he received his money, that his safe had recently been robbed, and that he would not be responsible for the money deposited in it. See *Weisenger v. Taylor*, 1 Bush (Ky.) 275. In *McDaniels v. Robinson*, (26 Vt. 316), the court conceded that a loss by robbery, by a felonious entry of the defendant's house in the night, might excuse him where it assumed the form of superior force; and yet held it incumbent on him to establish the loss in that manner by satisfactory evidence.

⁴ *Hulett v. Swift*, 42 Barb. 230; S. C. 33 N. Y. 571; *Shaw v. Berry*, 31 Maine, 478; *Sibley v. Aldrich*, 33 N. H. 533; *Mason v. Thompson*, 9 Pick. 280; *Sasseen v. Clark*, 37 Ga. 242; *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302; *Burrows v. Trieber*, 21 Md. 320; *Coskery v. Nagle*, 83 Ga. 702; *Norcross v. Norcross*, 53 Me. 163; *Dumbier v. Day*, 12 Neb. 596; *Burbank v. Chapin*, 140 Mass. 123. As to act of public enemy, see *ante*, § 157.

⁵ *Ingallsbee v. Wood*, 33 N. Y. 577. See 14 Albany Law Journal, 128.

In *Hulett v. Swift*, *supra*, the plaintiff's horse, harness and wagon, containing goods of considerable value, were destroyed by fire in the night, while the same were in the defendant's custody as an innkeeper; the origin of the fire was not shown; and

§ 464. The law does not hold any bailee liable for losses caused by the public enemy; or for losses caused by the act of God, that is, by irresistible force, or by inevitable accident, under the action of natural forces. And hence, briefly, the innkeeper is not answerable for losses occasioned by superior force; not answerable, unless he has made an express contract assuming a liability not imposed upon him by law.¹

§ 465. A guest cannot recover against an innkeeper for the loss of his goods, where his own negligence contributed to the loss. Slight omissions of care will not prevent his recovery. An omission to lock his door on retiring to rest, is not necessarily such negligence as will defeat his action;² and yet an omission of this kind, where the guest has also failed to deposit his money or his baggage in the place appointed, may be properly considered on the question of negligence;³ as it may, where a considerable sum of money is left in a trunk in his room, and the room is left unlocked, in disregard of the innkeeper's request. As a rule, the guest cannot recover where the loss happens through his fail-

plaintiff recovered the value of the property. The decision was soon after followed by an act of legislation. Chapter 658, Laws of N. Y. of 1866.

§ 1. No innkeeper shall be liable for the loss or destruction by fire of property received by him from a guest, stored or being with the knowledge of such guest in a barn or other out-building, where it shall appear that such loss or destruction was the work of an incendiary, and occurred without the fault or negligence of such innkeeper.

§ 2. No animal belonging to a guest and destroyed by fire while on the premises of any innkeeper, shall be deemed of greater value than \$300, unless an agreement shall be proved between such guest and innkeeper that a higher estimate shall be made of the same.

Under this statute the burden is upon the innkeeper to show that the fire was an incendiary one, and to show absence of negligence on his part. *Faucett v. Nichols*, 64 N. Y. 377.

See *Cutler v. Bonney*, 30 Mich. 259, holding that the innkeeper is not liable for losses by fire not caused by his negligence. In *Ingallsbee v. Wood*, *supra*, the plaintiff's horse and wagon left at an inn, were burned up during the night; and no recovery was allowed, on the ground that neither the plaintiff nor his agent was a guest in the house, disapproving *Mason v. Thompson*, 9 Pick. 280.

¹ *Harmony v. Bingham*, 12 N. Y. 99, 107; how far the act of God will excuse the performance of a contract, depends upon circumstances. In some cases, it simply varies the mode of the performance, without otherwise affecting the obligation of the contractor: *Williams v. Vanderbilt*, 28 N. Y. 217. The refusal or willful action of a third party does not excuse performance: *Blacksmith v. Fellows*, 7 N. Y. 401, 415; S. C. 19 How. U. S. 366; 42 N. Y. 126.

² *Morgan v. Ravey*, 6 H. & N. 265; *Filipowski v. Merriweather*, 2 F. & F. 285; *Classon v. Leopold*, 2 Sweeny, 705. See *Spring v. Hager*, 145 Mass. 186; *Murchison v. Sergeant*, 69 Ga. 206; *Gile v. Libby*, 36 Barb. 70; *Batterson v. Vogel*, 10 Mo. App. 235.

³ *Wilson v. Halpin*, 1 Daly, 496; *Buddenburg v. Bonner*, 1 Hilton, 84; *Oppenheim v. White Lion Hotel*, L. R. 6 C. P. 515; *Bohler v. Owens*, 60 Ga. 185.

ure to exercise ordinary or reasonable care on his part; or where, to express the same thing in other words, his want of ordinary care contributes to the loss.¹ There is nothing arbitrary in the rule. The guest is not allowed to recover damages resulting in part from his own negligence; or for a loss that would not have occurred, had he used the ordinary care which a prudent man may be reasonably expected to take, under the circumstances.²

§ 466. A reckless or foolish exposure of his money by the guest, increases the danger of loss by theft;³ and may become, in connection with other negligent omissions, contributory negligence, when the money is soon after lost by theft.⁴ So a guest may be guilty of contributory negligence, where he allows another person to exercise acts of ownership over his baggage, and leaves the landlord ignorant of his title; thus helping the fraudulent party to appropriate and carry off his property.⁵

It is not easy to give a definition of contributory negligence, broad enough to cover all cases likely to arise, and yet sufficiently specific to be of service. The guest cannot recover of the innkeeper, where he misleads him as to the value and contents of a package, and so throws him off his guard.⁶ There need not be an intention to mislead.⁷ His imprudent conduct conducing to the loss, or exposing his goods to peril, will defeat his recovery.⁸

A guest can have no cause of action, where he does not confide his goods to the keeping of the innkeeper;⁹ and on the other hand, his failure to make a formal delivery of them, will not exonerate the innkeeper from responsibility for goods brought into his house or upon his premises in the usual, or in a reasonable manner.¹⁰ His duty to receive

¹ *Fowler v. Dorlon*, 24 Barb. 384; *Armistead v. White*, 6 Law & Eq. Rep. 349; *Chamberlain v. Masterson*, 26 Ala. 371; *Hadley v. Upshaw*, 27 Texas, 547; *Profillet v. Hall*, 11 La. Ann. 324; *Pervis v. Coleman*, 21 N. Y. 111; *Elcox v. Hill*, 98 U. S. 218.

² *Cashill v. Wright*, 6 Ellis & Black. 891; as to ground of the rule, see *Brown v. Maxwell*, 6 Hill, 592.

³ *Armistead v. White*, supra.

⁴ *Burrows v. Treiber*, 21 Md. 320.

⁵ *Kelsey v. Berry*, 42 Ill. 469.

⁶ Without being directly adjudged, the proposition of the text is strongly sustained by analogy. *Bendetson v. French*, 46 N. Y. 266. A carrier receiving a trunk for transportation, has a right to assume and act upon the assumption that it contains only ordinary baggage: *Richards v. Westcott*, 2 Bosw. 589; 7 Bosw. 6.

⁷ Following out the analogy, see *Pardee v. Drew*, 25 Wend. 462; *The Great Northern R. Co. v. Shepherd*, 14 Eng. Law & Eq. 367.

⁸ *Fowler v. Dorlon*, 24 Barb. 384; *Fuller v. Coats*, 18 Ohio St. 343; *Houser v. Tully*, 62 Pa. St. 92.

⁹ *Sneider v. Geiss*, 1 Yeates, 34; *Houser v. Tully*, supra.

¹⁰ *Treiber v. Burrows*, 27 Md. 130; *Epps v. Hinds*, 27 Miss. 657; *Sasseen v. Clark*, 37 Geo. 242.

guests, with their luggage and goods, and provide for them, is affirmative; and hence an expression of preference by a guest for a given room as a place of deposit for his goods or baggage, or his knowledge of the situation or bad construction of the stables or stalls where his horses are placed, does not imply an agreement for their use, or render him chargeable for contributory negligence, in their use.¹ The innkeeper is answerable for the fitness and sufficiency of his accommodations, for the custody and for the handling of the property, until it is redelivered to the guest on his departure.²

§ 467. Statutory modifications of the common law, affecting the liability of innkeepers, are to be found in England and in several of our States, designed for the protection of the innkeepers as well as the public. It is noticeable that these statutes do not introduce any new principles, unknown to the common law; and that they give the means of security to the guest as well as the innkeeper.

Under the English statute an innkeeper is not liable to make good any loss or injury to the goods or property of a guest, not being a horse or other live animal or any gear appertaining thereto or any carriage, to a greater amount than 30*l.*, except. 1, where such goods or property shall have been stolen, lost or injured through the willful act, default, or neglect of the innkeeper or any servant in his employ; 2, where such goods or property shall have been deposited expressly for safe custody with the innkeeper; with a proviso, that in case of such deposit it shall be lawful for the innkeeper, if he think fit, to require as a condition of his liability, that the goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same. Any defaults of the innkeeper preventing, or his refusal to accept a deposit of the goods or property of his guest, deprives the innkeeper of any benefit secured to him by the statute; so does his omission to post or exhibit a printed copy of the first section of the act in conspicuous parts of the hall or entrance to the house. The word *inn* includes any hotel, inn, tavern or public house.²

The New York statute on the subject is cast in a different mold; it is different in form, and does not apparently so much limit the innkeeper's liability. It relieves the proprietor of a hotel from liability for any loss

¹ Packard v. Northcroft, 2 Metc. (Ky.) 439; Dickerson v. Rodgers, 4 Humph. (Tenn.) 179; Metcalf v. Hess, 14 Ill. 129; Sibley v. Aldrich, 33 N. H. 553; Seymour v. Cook, 53 Barb. 451; Jordan v. Boone, 5 Rich. S. C. 528; Washburn v. Jones, 14 Barb. 193; Hill v. Owen, 5 Blackf. 323; Dawson v. Chamney, 5 Q. B. 164; 13 L. J. Q. B. 33; Day v. Bather, 2 H. & C. 14.

² 26 and 27 Vict. c. 41. See copy of the statute, 3 Fisher's Digest, 4689; 2 Broom and Hadley's Com. 192; Spice v. Bacon, 16 Albany Law Journal, 385.

of money, jewels or ornaments, on certain terms; viz. when he provides a safe in the office or in some convenient place for the safe-keeping of such articles, and notifies his guest thereof, by posting a notice to that effect in a conspicuous place and manner in the office and public room and in the public parlors of the hotel, and the guest neglects to deposit his money, jewels or ornaments in the safe so provided. The notice is in effect a request or invitation that these articles, specially named, be deposited in the safe.¹

§ 468. The exemption under the statute of this State is limited to the particular species of property named, and being in derogation of the common law, it cannot be extended in its operation and effect by doubtful implication, so as to include property not fairly within the terms of the act; such as a watch and chain worn by a guest in the usual manner.² The statute is to be enforced according to its terms; it covers jewelry, in separate pieces, or done up in packages;³ and ornaments, not including ornamental things of use, like a gold pen and pencil case.⁴ The manifest intent of the statute is to enable the innkeeper to protect himself against losses of small and valuable parcels, that are capable of being deposited in a safe and are not actually worn as a part of one's apparel.

On arriving at a hotel the guest must, for his own protection, deposit

¹ See Laws of 1855, Chap. 421; Laws of 1871, Chap. 802; Laws of 1867, Chap. 677; Laws of 1883, Chap. 227; Laws of 1892, Chap. 284. These several enactments show the various stages by which the rigid rule of the common law has been modified in this State. It is now provided by statute as follows: "Whenever the proprietor or proprietors of any hotel or inn shall provide a safe in the office of such hotel, or other convenient place, for the safe-keeping of any money, jewels or ornaments belonging to the guests of such hotel or inn, and shall notify the guest thereof by posting a notice (stating the fact that such safe is provided, in which such money, jewels, or ornaments may be deposited) in a public and conspicuous place and manner in the office and public room, and in the public parlors of such hotel; and, if such guest shall neglect to deliver such money, jewels or ornaments to the person in charge of such office for deposit in such safe the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments sustained by such guest by theft or otherwise, but no hotel proprietor or lessee shall be obliged to receive property on deposit for safe-keeping exceeding five hundred dollars in value; and if such guest shall deliver such money, jewels or ornaments to the person in charge of such office, for deposit in such safe, said proprietor or proprietors, shall not be liable for any loss thereof, sustained by such guest, by theft or otherwise, in any sum exceeding the sum of two hundred and fifty dollars, unless by special agreement in writing by proprietor or manager." Laws of 1892, Chap. 284. Many of the decisions under the earlier statutes are now obsolete.

² *Ramaley v. Leland*, 43 N. Y. 539; modifying *S. C. 6 Robt. 358*.

³ *Bendetson v. French*, 46 N. Y. 266; *S. C. below*, 44 Barb. 31.

⁴ *Gile v. Libby*, 36 Barb. 70; 43 N. Y. 539.

the specified articles ; he must comply with the terms of the statute.¹ And in offering a package for deposit, he should state its contents. On his departure, the articles are to be surrendered to the guest, so that he may repack them ; and the liability of the innkeeper attaches until the property is duly delivered, when the guest leaves the house.²

The innkeeper's refusal to accept a deposit, duly tendered, if within the statutory limit, will deprive him of the protection of the statute ; and personal notice to the guest, without posting it as required by the statute, will give the proprietor of the house the protection of the law.³

§ 469. It was formerly considered a debatable question, whether common carriers and innkeepers may contract for a more restricted liability than the law imposes upon them in the absence of a special agreement ; but the question has been long settled in their favor. It is agreed that they may make reasonable rules regulating the manner in which they will accept and keep or carry goods ; such as requiring that the contents of packages delivered to a carrier shall be made known, and that goods delivered to an innkeeper shall be deposited in a particular room.⁴ This is no more than saying that the guest may take upon himself the care and custody of his goods, so as to relieve the innkeeper of his responsibility ; and that the person who delivers property to a carrier is bound to deal fairly and state frankly the contents of packages to be carried.⁵

§ 470. The responsibility of the innkeeper begins from the moment he receives a guest with his goods, and it ends when the relation between him and the guest is dissolved. The privileges and responsibilities of the innkeeper are reciprocal and dependent upon each other, as a duty upon a right.⁶ For his liability he has a lien on the goods intrusted to him. And where the law does not give him a lien on goods or property coming into his custody, it does not hold him liable as an innkeeper.⁷

§ 471. *Innkeeper's duty to receive Guests.* The keeper of a common

¹ Rosenplaenter v. Roessle, 54 N. Y. 262.

² Bendetson v. French, 44 Barb. 31; S. C. 46 N. Y. 266.

³ Purvis v. Coleman, 21 N. Y. 111. The substitution of personal or actual notice in place of the posted notice required by the statute has been held ineffectual in other States. Lanier v. Youngblood, 73 Ala. 587; Batterson v. Vogel, 8 Mo. App. 24.

⁴ Orange Co. Bank v. Brown, 9 Wend. 85, 114; Richmond v. Smith, 8 Barn. & Cress. 9; 4 Burr. 2301.

⁵ Stanton v. Leland, 4 E. D. Smith, 88. The rules must be reasonable; Johnson v. Richardson, 17 Ill. 302; 14 La. Ann. 324, 524; 7 Hill, 47; Nevins v. The Bay State S. Co., 4 Bosw. 225, 238.

⁶ BRONSON, J., in Grinnell v. Cook, 3 Hill, 485, 490, 491.

⁷ Fox v. McGregor, 11 Barb. 41; Peet v. McGraw, 25 Wend. 653; Mowers v. Fethers, 61 N. Y. 34.

inn is not at liberty to refuse to receive a guest, for whom he has room, either in the day time or at night; neither can he discharge himself from his legal responsibility by a refusal to take care of his goods on the ground that there are suspected persons in the house for whose conduct he is not willing to be answerable.¹ If, having room for him, he refuses to receive a guest, without a reasonable ground for his refusal, or on a false pretence that his house is full, he will be liable to an action, both civilly and criminally.² An indictment lies against an innkeeper, who, having room in his house at the time, refuses to receive a traveler; and it is not necessary for the traveler to tender the price of his entertainment if his rejection is not placed on that ground. And it is no defense for the innkeeper that the guest was traveling on a Sunday, or at an hour of the night after the landlord had gone to bed; nor is it any defense that the guest refused to tell his name and abode, since the innkeeper has no right to insist upon knowing these particulars; but if the guest come in drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him.³

The innkeeper does not undertake absolutely to receive as guests all persons who come to his house, but only those who are capable of paying a compensation suitable to the accommodations provided.⁴ He has a right to demand prepayment;⁵ but if he hangs out a sign and opens his house for travelers, it is an implied engagement to entertain, on the same terms, all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.⁶ The putting up of a sign is only a matter of evidence, and by no means necessary to prove that a house or hotel is really a common inn.⁷

§ 472. In a private action against an innkeeper for refusing a traveler lodgings for the night, it is proper to allege a tender of compensation, so as to take from the landlord every excuse for not receiving him.

¹ Jones on Bailm. 94.

² Dyer, 158 b 1; Rex v. Ivens, 7 Carr. and Payne R. 213. State v. Steele, 106 N. C. 766. It is provided by statute in this State that no person shall be denied the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of all hotels, inns, taverns, restaurants, public conveyances on land or water, theaters and other places of public resort or amusement, because of race, creed, or color; and that any one denying any person such full enjoyment for the reasons specified is guilty of a misdemeanor. Laws of 1881, Chap. 400.

³ 7 Carr. and Payne R. 213; Commonwealth v. Naylor, 34 Penn. St. 86; S. C. 2 Pars. Pa. Sel. Cas. 431; Markham v. Brown, 8 N. H. 523.

⁴ Thompson v. Lacy, 3 Barn. & Ald. R. 285.

⁵ 9 Rep. 87.

⁶ 3 Black Com. 166.

⁷ 5 Sand. R. 242; 3 Hill, R. 150; Howt v. Franklin, 20 Texas, 798.

It should also be made to appear, that the plaintiff's application was not broader than his legal right; *e. g.*, that he applied for reasonable accommodations; since he has no right to select and demand a particular apartment.¹

To sustain an indictment for not receiving a guest, there must also be a tender of compensation, unless the refusal is placed upon some other ground.² In one of the old books the rule is laid down in these words: "If one who keeps a common inn refuse either to receive a traveler as a guest into his house or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages to the party aggrieved in an action on the case, but may also be indicted and fined at the suit of the king; and it is no way material whether he have a sign before his door or not, if he make it his business to entertain passengers."³ The innkeeper is also liable to an indictment at common law as being guilty of a public nuisance, where he usually harbors thieves or persons of a scandalous reputation, or suffers frequent disorders in his house, or takes exorbitant prices.⁴

The innkeeper, as a general rule, has no right to exclude persons from entering the inn, and going into the common public rooms, on a lawful business. His house is a public resort.⁵ And yet it is his right, as it is his duty, to preserve quiet and order in the house; in the approaches to it, in its passages and apartments.⁶ He has the right also to defend his business against the agents of a rival inn, that seek to decoy away his customers.

When a person applies for entertainment at an inn, and the innkeeper refuses to receive him because his house is already full, and the traveler nevertheless insists upon entering, saying that he will shift among the rest of the guests, and accordingly places his baggage in the chamber without the keeper's consent, where he is robbed, he does not in fact become a guest;⁷ and he does not become entitled to protection as a guest, where the host requires as a condition of his liability

¹ *Fell v. Knight*, 8 Mees. and Welsb. R. 269. The right to lodge and be fed, does not give a party the right to insist upon carrying on a business in a private or public house. *Ambler v. Skinner*, 7 Robt. 561; 61 N. Y. 34.

² *Rex v. Ivens*, 7 Carr. and Payne, 213.

³ 2 Hawkins' Pleas of the Crown, 267.

⁴ *Idem*; *Baldwin v. State*, 6 Ohio, 15; *State v. Matthews*, 2 Dev. and B. (N. C.) L. 424; *South v. Grant*, 7 N. J. L. (2 Hals.) 26.

⁵ *Markham v. Brown*, 8 N. H. 523; *Linkous v. Commonwealth*, 9 Leigh R. 608. See *State v. Steele*, 106 N. C. 766.

⁶ *Wendell v. Baxter*, 12 Gray, 496. *Jencks v. Coleman*, 2 Sumner, 221.

⁷ *Dyer*, 158.

that the goods be placed in a particular room, under lock and key, and he refuses and retains them in his own custody.¹ He cannot coerce the innkeeper beyond the limits of reason and fair dealing.

§ 473. *Innkeeper's Lien.* The law gives to the innkeeper a lien on the goods entrusted to him by his guest, for his reasonable charges. Holding him bound to receive and entertain travelers, and liable for their goods under a strict rule of responsibility, the law gives him the means of securing a fair compensation for the entertainment which he supplies.² He has a lien where he is liable as an innkeeper; and he is so liable only for goods entrusted to him by a guest. Accordingly he has no lien for the keeping of horses received by him from one of his neighbors, or from a person who does not become his guest.³ The relation of innkeeper and guest is the foundation of the lien.⁴ The relation must exist; but it is not necessary that the owner of the goods should continue actually *infra hospitium*.⁵ The lien once created, will subsist as long as the relation continues, actually or constructively.⁶ It rests upon the goods of the guest; it does not justify a detention of the guest himself for any reckoning due, or the taking of any clothes or wearing apparel from off his person, as security for the same.⁷

§ 474. The relation of innkeeper and guest being established, the lien covers the goods, baggage, and property of the guest, and all such things as the guest brings with him; it extends to whatever the guest brings and the innkeeper receives; it is not limited to property of the guest,⁸ or to things of material or intrinsic value.⁹ It covers such goods as a traveler ordinarily or naturally carries with him, and even peculiar things, where the innkeeper receives them without notice that they are the property of a third person; it does not cover a chattel subsequently

¹ Bacon's Abr. Inns and Innkeepers, c. 4.

² Grinnell v. Cook, 3 Hill R. 488; Peet v. McGraw, 25 Wend. 653; Fox v. McGregor, 11 Barb. 41.

³ Grinnell v. Cook, supra; Ingallsbee v. Wood, 36 Barb. 452; S. C. 36 N. Y. 577.

⁴ Binns v. Pigot, 9 C. and P. 208; Smith v. Dearlove, 6 Com. B. 132.

⁵ McDonald v. Edgerton, 5 Barb. 560.

⁶ Allen v. Smith, 12 Com. Bench N. S. 638; 9 Jur. N. S. 230, 1284; 11 W. R. 440.

⁷ Sunbolf v. Alford, 3 M. and W. 248; as to who are to be considered guests, see ante, §§ 455-458. The lien extends to property exempt from execution and will attach to a coat brought into the inn by a guest. Swan v. Bournes, 47 Iowa, 501.

⁸ Threlfall v. Borwick, 2 English (Moak) R. 689; Jones v. Morrill, 42 Barb. 623; 31 How. Pr. 639; Manning v. Hollenbeck, 27 Wis. 202; Snead v. Watkins, 1 Com. B. N. S. 267; 37 Eng. Law and Eq. 384; Marcuse v. Hogan, Montreal L. Rep. 6 Supr. Ct. 184. This is undoubtedly the rule as to goods of third persons brought into the inn by a guest if the innkeeper had no notice of the true ownership. Cook v. Kane, 13 Oregon, 482; Covington v. Newberger, 99 N. C. 523; McIlvane v. Hilton, 7 Hun, 594.

⁹ Snead v. Watkins, supra, relating to a Letter Book belonging to the plaintiff.

hired by the guest and brought into the inn;¹ and it is not defeated by showing that the guest wrongfully took the property from a third person.² The reason given is this: the innkeeper is bound to receive the guest, and cannot stop to investigate his title to the property he brings with him;² and, it may be added, he is also liable for the safe keeping of the goods, though they be the property of a third person.³

The contract is one and indivisible. The compensation paid by the guest for his accommodations, covers the custody of his goods.⁴ And hence the innkeeper has a lien on the goods of his guest, for board, lodging, and wine supplied on his order.⁵ The guest not being an infant, the lien covers the fair value of the articles supplied to him, and is not limited to a charge for a reasonable room with board and lodgings, or a reasonable quantity of wine. The guest being an infant, the lien covers the innkeeper's reasonable charges, and nothing more.⁶

§ 475. The rule giving the innkeeper a lien on the goods brought to his inn, and not owned by the guest, was adopted with some hesitation; and some of the decisions would seem to countenance the theory that the innkeeper's lien on living chattels thus brought to his house, is to be regarded as specific—namely, as a lien for their keep.⁷ But the current of authority allows him to detain any parcel of the goods belonging to the guest, or brought with him, as security for his entire bill.⁸

The innkeeper waives or loses his lien, by suffering his guest to take away his goods, when he finally leaves the house, and the lien will not revive on his return with the goods to the inn.⁹ A tender of the amount due, extinguishes the lien.¹⁰

§ 476. The innkeeper's lien upon the goods of his guest does not, under the common law, clothe him with the right to sell them for the satisfaction of his charges; his remedy to enforce the lien is by an

¹ Bacon's Abr. Inns and Innkeepers, tit. D; Broadwood v. Granara, 10 Exch. 417; 1 Jur. N. S. 19; Fox v. McGregor, 11 Barb. 41, 43. See Threlfall v. Borwick, supra.

² Johnson v. Hill, 3 Stark. 172; Jones v. Morrill, 42 Barb. 623.

³ Needles v. Howard, 1 E. D. Smith, 54; 1 Lans. 397; 3 Hill, 485, 490.

⁴ Lane v. Sir Robert Cotton, 12 Mod. R. 480.

⁵ Proctor v. Nicholson, 7 C. and P. 67.

⁶ Watson v. Cross, 2 Duvall (Ky.), 147.

⁷ Johnson v. Hill, 3 Stark. 172; Turrill v. Crawley, 13 Q. B. (13 Adol. & Ellis, N. S.), 197. See Gump v. Showalter, 43 Penn. St. 507.

⁸ Young v. Kimball, 23 Penn. St. 193; Jones v. Morrill, 42 Barb. 623. Where several travel and put up together at an inn, the goods of one cannot be detained for the board of all. Clayton v. Butterfield, 10 Rich. (S. C.) 300; Hursh v. Byers, 29 Mo. 469.

⁹ Jones v. Thurloe, 8 Mod. R. 172; Bevan v. Waters, 3 Carr. and Payne, 520.

¹⁰ Gordon v. Cox, 7 C. and P. 172.

action in the nature of a bill in equity.¹ Within the city of London he has such a right to sell by special custom, and beyond the city he has no such right by the general custom, which is the common law of the realm. Under the statute law of this State, innkeepers and carriers may have unclaimed baggage sold on due notice, and the proceeds applied first, to the payment of their charges and expenses, and the balance paid over to the overseers of the poor, subject to be reclaimed by the owner within seven years.² And while there does not appear to be any reason to prevent the adoption of a rule permitting the innkeeper to sell the goods in his hands on which he has a lien, without suit, in like manner as a pledgee may sell, on reasonable notice; we do not find any sanction for that practice. On the contrary, our law requires a foreclosure by action; and it now permits a foreclosure in any court having jurisdiction of the amount.³

§ 477. By the statute law of this State, boarding-house keepers have the same lien as innkeepers have, upon the baggage and effects of a boarder for the board due.⁴ They stand in much the same relation, and the intent of the statute is to protect them as a class;⁵ by giving to them the same right to detain the goods of a boarder, as the law gives to the innkeeper to detain the goods of a guest.⁶ The statute gives the lien for the amount due for board.⁷ And it is well understood that a remedy thus given is to be carried into effect according to the intention of the Legislature.⁸

¹ Fox v. McGregor, 11 Barb. 41; 1 Str. 556; Pothonier v. Dawson, 1 Holt N. P. 383; 2 Kent's Comm. 642. See Trust v. Pirsson, 1 Hilton, 292.

² 2 R. S. of N. Y. 984, 985, 6th ed. Ante, §§ 317, 279, 287.

³ Code of Civil Procedure, §§ 1737-1741.

⁴ Chapter 446, Laws of 1860.

⁵ Cady v. McDowell, 1 Lansing, 484.

⁶ Stewart v. McCready, 24 How. Pr. 62; Jones v. Morrill, 42 Barb. 623; S. C. 31 How. Pr. 639; the statute is modified in this particular. The right of lien is not affected by the fact that there was a special contract as to board and lodging between the boarding-house keeper and the boarder. Misch v. O'Hara, 9 Daly, 361.

⁷ Shafer v. Guest, 6 Robt. 264.

⁸ A literal interpretation of the New York statute would defeat the intention of the Legislature. Jones v. Morrill, supra; Stewart v. McCready, 24 How. Pr. 62. See Cross v. Wilkins, 43 N. H. 332; Bayley v. Merrill, 10 Allen (Mass.), 360; and Gump v. Showalter, 43 Penn. St. 507, interpreting like statutes of those States. Of course the keeper of a boarding-house has no lien at common law on the goods of a boarder. Southworth v. Myers, 3 Bush (Ky.), 681; and the livery-keeper has none. Parsons v. Gingell, 4 Com. Bench, 545. Chapter 319, of the N. Y. Laws of 1876, qualifies the lien given to the keeper of a boarding-house in one respect; it provides that he shall not have a lien upon or right to detain any property the title to which shall not be in the boarder. The material section of the act now reads as follows:

"§ 1. The keeper of a boarding-house shall have the same lien upon and right to

The statute has not changed the rule of liability. The keeper of a boarding-house is not held liable for the goods of a boarder under the same strict rule as the innkeeper is held for the goods of his guest. He is not an insurer; he fulfills his duty when he takes such care of the goods of a guest as a prudent householder would take, in guarding and protecting the house against thieves, and in the employment of trustworthy servants.¹ The keeper of a lodging-house, who lets rooms by the day or by the week, does not assume any responsibility for the safe-keeping of his lodger's goods; he does not take them into his custody.²

§ 478. The statute of the State assumes in some few particulars to regulate the business of the innkeeper. With us it provides that he shall post up in the office or public room and in the public parlors of his house the rate of his charges by the day, and for meals, and for lodging.³ It also provides for the granting of a license to the innkeeper to sell strong or spirituous liquors and wines, to be drank on his premises.⁴ The license system, which appears to have been established at an early day, was introduced for the same reason on which it is continued; namely, as a means of revenue, and as a mode of preventing the increase of taverns, saloons and alehouses. The license adds a new feature to the original business of the innkeeper;⁵ and it brings the business under the regulations of the statute.

In general, the duties of innkeepers are prescribed by the common law in all these States, except Louisiana; in which the innkeeper is responsible as for a necessary deposit, for the effects brought by travelers, whenever they are delivered into his care, or into the hands of his servant; and he is also responsible where the effects are stolen or damaged by his servants or agents, or by strangers going or coming in the inn; but he is not responsible for what is stolen by force and

detain the baggage and effects of any boarder to the same extent and in the same manner as innkeepers have such lien and right of detention; but nothing herein shall be deemed to give to any boarding-house keeper any lien upon or right to detain any property the title to which shall not be in such boarder." A boarding-house keeper has no right to detain the separate property of the wife for board of herself and husband furnished under a special contract with the husband. *McIlvane v. Hilton*, 7 Hun, 594; *Birney v. Wheaton*, 8 State Rep'r, 347.

¹ *Dausey v. Richardson*, 25 Eng. Law and Eq. 76.

² *Holder v. Soulby*, 8 Com. Bench N. S. 254; *Cromwell v. Stephens*, 2 Daly, 15. A barber is not liable for a coat not properly delivered; *Trowbridge v. Shriever*, 5 Daly, 11.

³ Chap. 677, Laws of 1867, as amended by chap. 802, Laws of 1871; Laws of 1883, Chap. 227, § 3.

⁴ Laws of 1892, Chap. 401, § 19.

⁵ *Overseers of the Poor v. Warner*, 3 Hill, 150.

arms, or by the breaking open of his house, or by any other extraordinary violence.¹

§ 479. The action against an innkeeper is based on his employment and his failure to fulfill the duty imposed upon him by law.² It is sustained by showing a delivery to him as an innkeeper, and his failure to restore the property, or his return of it in an injured condition.³ The presumptions are all against him, as they are against a common carrier; and he must excuse himself by showing a loss through the negligence or folly of the guest, the act of God, or the public enemy; * or by showing that the guest refused to comply with his reasonable regulations in respect to the deposit of the goods.⁵ He cannot relieve himself from liability by showing that he was sick or absent from home at the time of the loss, or that the goods were sent with his servant to the depot, or lost without his actual fault.⁶

¹ Code of La., Arts. 2935 to 2940; *Woodworth v. Morse*, 18 La. Ann. 156.

² *Classen v. Leopold*, 2 Sweeny, 705, 712.

³ *Seymour v. Cook*, 53 Barb. 451; *Metcalf v. Hess*, 14 Ill. 129; *Hulett v. Wood*, 33 N. Y. 571.

⁴ *Wilkins v. Earle*, 44 N. Y. 172; *Allen v. Smith*, 12 Com. Bench, N. S. 638; *Best on Evidence*, § 430; *Sasseen v. Clark*, 37 Ga. 242; *Calye's Case*, 8 Co., 32 Roll. Abr. 4.

⁵ *Hyatt v. Taylor*, 42 N. Y. 258; *Rosenplanter v. Roessle*, 54 N. Y. 262; *Purvis v. Coleman*, 21 N. Y. 111.

⁶ *Sasseen v. Clark*, 37 Ga. 242; *Calye's Case*, 8 Co., 32; Roll. Abr. 4.

CHAPTER VIII.

SPECIAL AND QUASI-CARRIERS.

§ 480. Contracts for the transportation of goods or property, made by parties not holding themselves out to the world as common carriers, are to be enforced according to their terms. The contractor being a special carrier, is bound only for the exercise of ordinary care, skill and foresight; ¹ as where he engages to raft lumber or to drive cattle or to transport a load of grain.²

The proprietors of steamboats and tugs engaged in the business of towing boats laden with merchandise, for hire, are not common carriers; they do not take the property into their custody, and they do not exercise much control over it; they supply the motive power, and the goods remain in the custody of the master of the vessel which is being towed.³ They are not therefore liable as common carriers; their liability is fixed by the principles applicable to a simple contract. They are bound for the exercise of reasonable care and skill in the fulfillment of their contract; and though they engage to tow a vessel at the "risk of the owner," their agreement is not construed so as to excuse negligence on their part resulting in damages to the owner of the boat or the goods on board.⁴ Both parties must exercise care and diligence, the master of the towing boat and the master of the boat which is being towed; each to the extent of his legitimate control over the movements of the boat.⁵ The contract must be fairly fulfilled, according to its true intent.⁶

§ 481. There is a species of contract, much in use for the transportation of merchandise by water, known as a charter-party. It has two

¹ Allen v. Sackridge, 37 N. Y. 341; Fish v. Clark, 2 Lansing, 176; 49 N. Y. 122.

² Shaw v. Davis, 7 Mich. 318; Pike v. Nash, 1 Keyes, 335.

³ Wells v. Steam Nav. Co., 2 N. Y. 204; Milton v. Hudson R. Steamboat Co., 37 N. Y. 210; Arctic Fire Ins. Co. v. Austin, 54 Barb. 559; post, §§ 562, 685; Varble v. Bigley, 14 Bush (Ky.), 698.

⁴ Wooden v. Austin, 51 Barb. 9; Arctic Fire Ins. Co. v. Austin, 54 Barb. 559; Alexander v. Greene, 3 Hill, 9; S. C. 7 Hill, 533; Wells v. Steam Nav. Co., 8 N. Y. 375.

⁵ Arctic Fire Ins. Co. v. Austin, 54 Barb. 559; Milton v. Hudson River S. Co., 4 Trans. Rep. 252; 37 N. Y. 210.

⁶ Vanderslice v. Newton, 4 N. Y. 130; Worth v. Edwards, 52 Barb. 40.

forms. The owner in one form, retaining the possession and manning and navigating his vessel, lets its capacity for carrying freight on a given voyage or circuit of voyages, for a specified consideration; this is considered a contract of affreightment, and it usually contains a clause by which the owner pledges the ship and the freighter the cargo, for its fulfillment.¹ And in the absence of this stipulation, the law implies the same obligation.² The charterer lades the vessel at his pleasure with a cargo of goods belonging to himself or to third parties; and where he pays the hire agreed upon, the freight earned by the vessel in carrying the goods of third parties, belongs to him; the hire being due and unpaid the owner has a lien on the goods for the freight earned in the transportation;³ and having delivered the goods, he is entitled to collect the freight.⁴

The terms of the charter-party determine the rights of the parties under it; they prescribe the voyage, or the length of the time for which the ship is chartered; her capacity, and the mode and time of lading and unlading her.⁵ When the freighter hires a ship for the voyage, and has the exclusive command and navigation of the ship, he is deemed the owner for the voyage.⁶ This form of the contract is not much used. It is a temporary transfer of the vessel, and the hirers stand in the place of the owners navigating her.⁷

§ 482. The ship, whether under a charter-party or not, derives her character from the manner in which she is employed. Advertised as a general ship, and remaining under the owner's command, the party shipping goods on her without any knowledge of the charter-party, has the same remedy against the owner as though no charter-party existed.⁸ The owner is not liable as a carrier, by virtue of his ownership; it is the employment of a vessel, by the owner, or by the party chartering her, which creates the liability.⁹

Between the parties to the charter-party, the owner navigating the

¹ The form of the contract is given in *Clarkson v. Edes*, 4 Cowen, 470.

² *The Brig Casco*, Davies, 184.

³ *Clarkson v. Edes*, supra; *Ruggles v. Bucknor*, 1 Paine C. C. 358; *Chandler v. Belden*, 18 John. 162.

⁴ *Mactaggert v. Henry*, 3 E. D. Smith, 390.

⁵ *Roberts v. Opdyke*, 40 N. Y. 259; *Ashburner v. Balchen*, 7 N. Y. 262; *Robbins v. Codman*, 4 E. D. Smith, 315; *Nelson v. Odiorne*, 45 N. Y. 489.

⁶ *Marcadier v. The Chesapeake Ins. Co.*, 8 Cranch. 49; R. S. of U. S. 832.

⁷ *Sherman v. Freame*, 30 Barb. 478; 30 N. Y. 231, 241.

⁸ *Breckle v. Knoop*, Law R. 2 Exch. 125, 333.

⁹ *Tuckerman v. Brown*, 17 Barb. 191. The charterer engaging to return boats "in as good condition as they now are, with the exception of the ordinary use and wear," does not insure them against the perils of the sea or risks of navigation. *Ames v. Belden*, 17 Barb. 513.

ship earns freight on delivering the goods at the place agreed upon;¹ and *pro ratu itineris*, where the goods are accepted voluntarily after a part of the voyage has been accomplished.

§ 483. *Mails*. The transmission of dispatches with speed and security, from one part of the country to another, is essential to the proper exercise of the functions of government; and we find the practice established at an early day. In England it appears to have been expanded first for the accommodation of the individuals composing the royal court, and afterwards by degrees so as to subserve the convenience of the whole people. It was not invented; it grew up slowly into an important branch of the public service, and is now with us organized and maintained as one of the departments of the general government.² The Postmaster-General is appointed by the President, with the advice and consent of the Senate; and his duties are of a purely public and executive character. He has no personal interest in the transmission of letters, or in the conduct of the department; he appoints and removes postmasters of certain classes, and the President appoints and removes others, with the advice of the Senate; and each postmaster gives a bond with sureties for the faithful discharge of all duties and trusts imposed upon him by law, or by the regulations of the department. The whole postal service, including the money order system, and branching out into endless particulars, is conducted and carried on under the sanction of statute law.³ The Postmaster-General acts therefore as an officer, and is not personally liable for the misconduct of those appointed by him as officers in the service, or employed by him in carrying the mails. He enters into no contract, and he receives no compensation from the individuals whose letters are carried in the mail.⁴ The same rule is applied in favor of a local postmaster; he is bound to act with integrity, and he must answer for the use of reasonable diligence in discharging the duties of his office; and thus acting he is not held liable for the malfeasance or embezzlement of clerks and deputies duly employed by him.⁵

§ 484. A local postmaster is a public officer, and as such answerable

¹ Cook v. Jennings, 7 Term, 381.

² R. S. of U. S. 64.

³ R. S. of U. S. 755-787.

⁴ Lane v. Cotton, 1 Ld. Ray. 646; Whitfield v. Despencer, Cowper, 754; Conwell v. Voorhees, 13 Ohio, 523.

⁵ Wiggins v. Hathaway, 6 Barb. 632; Schroyer v. Lynch, 8 Watts R. 453; Dunlop v. Monroe, 7 Cranch. R. 242; Bolan v. Williamson, 1 Brevard R. 181; Franklin v. Low and Swartwout, 1 John. R. 396; Maxwell v. McIvry, 2 Bibb. R. 211; Keenan v. Southworth, 110 Mass. 474; Hutchins v. Brackett, 2 Foster, 252; Bishop v. Williamson, 2 Fairf. 495.

to the Government and to individuals for a faithful and proper discharge of his duties; to the Government for the discharge of his general duties imposed by statute;¹ and to individuals, in either a Federal or a State court, for any failure in diligence resulting in damages, or for any misfeasance or nonfeasance resulting in special damages. *E. g.*, a postmaster is liable for negligence, in permitting a letter containing money to be stolen from his office;² and in an action of trover, for unlawfully refusing to deliver mail matter to an individual, to whom it is addressed³—even letters deposited for delivery at the same office.⁴

§ 485. One officer is not answerable for another; and it has been thought that a mail contractor is not liable to an individual for money lost through the carelessness of his agents carrying the mail; he is certainly not chargeable on the theory of contract, and he can hardly be considered an officer of the Government in the strict sense of that term.⁵ And yet the contractor has been held liable to third persons for an injury sustained through the negligence of his agent, on the ground of the public duty assumed by him, under the provisions of the statute law;⁶ and there does not seem to be any valid ground for a distinction between the liability of an officer and that of a contractor employed by the Government under the provisions of a statute.⁷

§ 486. *Telegraph.* Our telegraph companies render the community a service similar to that of the Post-Office Department; they carry and deliver messages for all persons, indifferently, for hire; they resemble common carriers, in the duty they assume to transmit messages for all persons alike, without discrimination or preference; and they differ from

¹ Strong v. Campbell, 11 Barb. 135, relates to the statute providing for the publication of a list of unclaimed letters in the paper having the largest circulation.

² Coleman v. Frazier, 4 Rich. (S. C.), 146; Bolan v. Williamson, 1 Brev. 181; S. C. 2 Bay, 551; Bishop v. Williamson, 11 Maine, 495.

³ Teall v. Felton, 3 Barb. 512; S. C. 1 N. Y. 537; S. C. 12 How. U. S. 284.

⁴ Nevins v. Bank of Lansingburgh, 10 Mich. 547; Bank of Columbia v. Lawrence, 1 Peters, 578.

⁵ Conwell v. Voorhees, 13 Ohio, 523.

⁶ Conwell v. Voorhees, 13 Ohio, 523. A mail contractor is not liable to the owner of a letter containing money, transmitted by mail, and lost by the carelessness of contractor's agents carrying the mail. The contractor is regarded as a public agent, and not as a common carrier. Sawyer v. Corse, 17 Gratt. 230. Contra: A mail carrier is not an officer of the Government, but is the private agent of the contractor for carrying the mail, and the contractor is liable to third persons for any injury or loss, as of money in a letter, sustained through the negligence or default of such agent in the performance of his duties. See Hall v. Smith, 2 Bing. R. 156; 9 Eng. C. L. R. 357; Holliday v. St. Leonards, 103 Eng. C. L. R. 192.

⁷ Robinson v. Chamberlain, 34 N. Y. 389; Hicks v. Dorn, 42 N. Y. 47; Hover v. Barkhoof, 44 N. Y. 113.

a common carrier in some important particulars ; ¹ notably, in the liability which they assume for the safe and accurate delivery of messages.²

Being incorporated, these telegraphic companies possess the powers and come under the liabilities prescribed by statute ; namely, the powers conferred, to construct their lines and carry on the business ; and the duty imposed to receive dispatches from and for other lines, and from and for any individual, on payment of their usual charges, and to transmit the same with impartiality and good faith.³ For the rest, they are generally left to transact their business under the principles of the common law ; the statutes in the different States being the same in their general scope and provisions.⁴

§ 487. These companies are not under the same liability as common carriers ; their liability is regulated by contract and the nature of their public employment. In the absence of a special contract limiting their liability, they are bound to transmit messages in the order received by them, and with a care and diligence proportionate to the importance of the business ; they do not insure the safe and accurate transmission of messages.⁵ And where they stipulate that they will not be liable for the accuracy of the message as delivered, unless it is repeated at half price, they are not liable for an error in its delivery, unless it is repeated ; ⁶ a rule to this effect is not regarded as unreasonable.⁷ And when the message is written upon a blank embodying the limitation, the rule is to consider the printed notice as a proposition, which is assented to by the act of sending the message.⁸ The object to be secured by repeating the message, is accuracy in its delivery ; and hence the stipulation will

¹ Breese v. U. S. Telegraph Co., 48 N. Y. 132; Leonard v. New York, etc., Tel. Co., 41 N. Y. 544, 571.

² Id.; Leonard v. N. Y., etc., Tel. Co., 41 N. Y. 544, 569.

³ Laws of 1890, Chap. 566, § 103. A telegraph company may make arrangements with the proprietors or publishers of newspapers for the transmission for publication of intelligence of general and public interest out of its regular order. Id.

⁴ 8 Amer. Law Rev. 457; the statute of Maine is a little more specific.

⁵ Breese v. U. S. Tel. Co., 48 N. Y. 132, 141; S. C. 45 Barb. 274; De Rutte v. N. Y. A. & B. Tel. Co., 1 Daly, 547; S. C. 30 How. Pr. 403; Pearsall v. Western Union Tel. Co., 124 N. Y. 256; Kiley v. Western Union Tel. Co., 109 N. Y. 231.

⁶ Western Union Tel. Co. v. Carew, 15 Mich. 525; Kiley v. Western Union Tel. Co., 109 N. Y. 231.

⁷ Breese v. U. S. Tel. Co., supra, 48 N. Y. 132; Bennett v. Western Union Tel. Co., 18 State Rep'r, 777; Redpath v. Western Union Tel. Co., 112 Mass. 71; Grinnell v. Western Union Tel. Co., 113 Mass. 299; Schwartz v. Atlantic & Pacific Tel. Co., 18 Hun, 157; Clement v. Western Union Tel. Co., 137 Mass. 463.

⁸ Camp v. Western Union Tel. Co., 1 Met. (Ky.) 164; Ellis v. Amer. Tel. Co., 13 Allen, 226; M'Andrews v. Electric Tel. Co., 33 Eng. Law and Eq. 180; 17 Com. B. 3; Kiley v. Western Union Tel. Co., 109 N. Y. 231; Breese v. U. S. Tel. Co., 48 N. Y. 132; Young v. Western Union Tel. Co., 65 N. Y. 163.

not relieve the company from its liability for omitting to send the message, or for any other like default or misconduct.¹

§ 488. Under the statute of New York telegraphic corporations have power to make such prudential rules, regulations and by-laws as they deem necessary in the transaction of their business, not inconsistent with the laws of the State or of the United States; and acting under this power, generally conferred upon these corporations, they may limit their liability for mistakes, not occasioned by gross negligence or willful misconduct, by a notice brought home to the sender of a message; as it is presumed to be, where he writes the message upon a blank embodying the notice.²

§ 489. The liability of a telegraphic company to the sender of a message is based upon contract; the company impliedly engages to use all reasonable care and diligence to transmit the message promptly and accurately. Delay in sending the message may be excused, where the sending of it becomes impracticable by a storm or by the sudden sickness of an operator, temporarily preventing its transmission.³ And an error or mistake in the delivery may be excused, where it is attributable in part to the sender, or where it occurs without any want of care or diligence on the part of the company.³ *Prima facie* the com-

¹ *Birney v. N. Y. & W. Tel. Co.*, 18 Md. 341; *Mann v. Western Union Tel. Co.*, 37 Mo. 472; *U. S. Tel. Co. v. Wenger*, 55 Penn. St. 262; *Gulf, Colorado, etc., Ry. Co. v. Wilson*, 69 Texas, 739; *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; *Mowry v. Western Union Tel. Co.*, 51 Hun, 126.

² *Camp v. Western Union Tel. Co.*, 1 Metcalfe (Ky.) 164; *Ellis v. Amer. Tel. Co.*, 13 Allen, 226; *M'Andrews v. Electric Tel. Co.*, 23 Eng. Law & Eq. 180; 17 Com. B. 3; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Birney v. Tel. Co.*, 18 Md. 341; *New York & W. Printing Tel. Co. v. Drybrug*, 35 Penn. St. 298; *Lewis v. Great Western R. Co.*, 5 Hurlstone and N. 867; *Grace v. Adams*, 100 Mass. 505; *Wolf v. West. U. Tel. Co.*, 62 Penn. St. 87. But the company cannot by notice limit its liability for mistakes unless the notice is brought to the personal knowledge of the lender and he assents to it. *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256. Rules of a telegraph company limiting its liability for mistakes do not apply to a liability occasioned by its gross negligence or willful misconduct. *Mowry v. Western Union Tel. Co.*, 51 Hun, 126; *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; *Western Union Tel. Co. v. Crall*, 38 Kans. 679; *Western Union Tel. Co. v. Howell*, 38 Kans. 685. And there are numerous cases holding that a telegraph company cannot contract that it shall not be liable for negligence in failing to transmit a message; *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; or for negligence in failing to deliver it. *Smith v. Western Union Tel. Co.*, 83 Ky. 104; *Gulf, Colorado, etc., Ry. Co. v. Wilson*, 69 Texas, 739.

³ *Per HUNT, J.*, in *Leonard v. The N. Y., A. & B. Electric M. Tel. Co.*, 41 N. Y. 544, 572; *Brownell v. Flagler*, 5 Hill, 282. Delay unexcused renders the company liable for damages. *West. Union Tel. Co. v. Ward*, 23 Ind. 377.

pany is liable for an error in the delivery of a message; and the rule is the same where the message is couched in technical terms.¹ Hence, in an action by the sender, proof of error in the delivery entitles him to recover; and in an action by the receiver, the plaintiff is *prima facie* entitled to recover on proving that a different message was delivered from that which was sent.²

§ 490. A telegraphic company is not answerable for the transmission of messages to a point beyond the termination of its line. Its engagement, like that of a common carrier, impliedly binds the company for the prompt and accurate transmission of the message over its line, and its delivery to the succeeding line;³ but where it makes an agreement and receives pay for the whole distance, by an arrangement with other companies, it is liable according to the terms of the contract, and must answer for the negligence of its auxiliaries.⁴ The mere fact of receiving pay for the whole distance does not establish the contract, or prove a partnership between the lines, or even a mutual agency. The statute itself establishes the relation of the connecting lines; so that in the absence of other proof the delivery of a message to the next line, is in effect like the transfer of goods by one carrier to a succeeding carrier.⁵ The line commencing where another ends, is obliged to receive and send forward the message;⁶ and is not liable for an error caused through the negligence of a prior line; it being its duty to transmit and deliver the exact message it receives.⁷

§ 491. In what relation does the telegraphic company stand toward the sendee of a message? This will depend upon the circumstances; the company holds itself out to the community as ready and willing to transmit intelligence for any and all persons, on payment of their established charges; and the contract is presumed to be made with the person bearing the charges and interested in its correct and diligent

¹ Rittenhouse v. Ind. L. Tel. Co., 1 Daly, 474; S. C. 44 N. Y. 263.

² Idem; West. Union Tel. Co. v. Carew, 15 Mich. 525; Birney v. Tel. Co. 18 Md. 341. In an action against a telegraph company for damages for failing to accurately or promptly deliver a message, the plaintiff makes out a *prima facie* case of negligence by proving the delivery to it of the message and that it was not accurately or promptly delivered. Pearsall v. Western Union Tel. Co., 124 N. Y. 256.

³ Leonard v. The N. Y., A. & B. Electric M. Tel. Co., 41 N. Y. 544.

⁴ De Rutte v. The N. Y., A. & B. Tel. Co., 1 Daly, 547, 553; Quimby v. Vanderbilt, 17 N. Y. 306; Collins v. R. R., 7 H. L. Cas. 194. See Stevenson v. The Montreal Tel. Co., 16 Upper Canada, 530.

⁵ Baldwin v. U. S. Tel. Co., 45 N. Y. 744; 1 Lans. 125; 54 Barb. 505; Squire v. W. U. T. Co., 9 Mass. 232.

⁶ U. S. Tel. Co. v. West. U. Tel. Co., 56 Barb. 46.

⁷ La Grange v. S. W. Tel. Co., 25 La. Ann. R. 383; Leonard v. N. Y. A. & B. E. M. Tel. Co., 41 N. Y. 570.

transmission; just as the contract with a carrier is presumed to be made with the owner of the goods delivered to him, whether that be the consignor or the consignee.¹

When a message is not sent on account of the party to whom it is addressed, it cannot be said that the telegraphic company makes a contract with him for its transmission. Its obligation to transmit and deliver is imposed by law; it is grounded upon the statute and upon the public employment assumed by the company; and there may be circumstances under which the company must be held liable to the sendee for its failure to transmit the message.² Assuming to send the message, the company must do so with diligence and accuracy, and it is liable to the sendee in damages, when through its negligence it delivers a different message from that received; as where an order for goods sent by telegraph is changed in the delivery, so as to call for a different article or for a larger amount.³ The duty of the company being of a public nature, it is liable to the party injured in an action on the case for injuries resulting from its carelessness.⁴

§ 492. Under an agreement between business men that their negotiations shall be carried on by telegraph, each party assumes the risk of the transmission; to a like effect as where the negotiation is carried on by letter.⁵ If an offer of sale be made by telegraph and accurately transmitted, it may be accepted by a return telegram. The mode of making the offer invites an acceptance in that manner.

When and to what extent dispatches sent by parties to each other by telegraph are to be treated as written contracts or written evidence of their contracts, must depend upon the circumstances in which they are sent, and the intent and object for which they are transmitted and received. Considering the company a public agent or the agent of both parties, it is quite clear that the message left for transmission is the original, and the message as delivered the copy; and equally clear that the sender cannot enforce the terms of an offer sent by telegraph in any form or sense different from that in which they are delivered.⁶ A tele-

¹ *De Rutte v. The N. Y., A. & B. Tel. Co.*, 1 Daly, 547, 555.

² *Trevor v. Wood*, 41 Barb. 255; S. C. 36 N. Y. 307. Here a failure to send the message leaves the purchaser without any knowledge of his purchase.

³ *N. Y. & W. Printing Tel. Co. v. Drybrug*, 35 Penn. St. 298; *Leonard v. N. Y. & C. Tel. Co.*, 41 N. Y. 544; contra, *Playford v. U. K. Tel. Co.*, Law R. 4 Q. B. 706.

⁴ *Marshall v. York, etc.*, R. R., 11 C. B. 655; *Alton v. Midland R. R.*, 19 C. B. N. S. 213; *Fairmount R. R. v. Stutler*, 54 Penn. St. 375; *Pippin v. Shepherd*, 11 Price, 40; *Gladwell v. Steggall*, 5 Bing. N. C. 733. For the general rule, see *Exchange Bank v. Rice*, 107 Mass. 37.

⁵ *Trevor v. Wood*, 41 Barb. 255; S. C. 36 N. Y. 307.

⁶ *Durkee v. Vt. Central R.*, 29 Vt. 127; *Mattheson v. Roberts*, 25 Ill. 591.

gram authorizing a draft on the sender for a given sum, is treated in the hands of the sendee as an unconditional promise in writing to accept the draft—virtual acceptance of it.¹ And a telegram sent to fix some detail or particular in an agreement, previously in negotiation between the parties, does not constitute the contract, so as exclude parol evidence to show the state of the negotiation when the telegram was sent.²

§ 493. Whether a telegraphic company is to be regarded as a public or as a private agent, it is liable in damages for the negligent conduct of an operator, in sending false and fraudulent messages; as where he receives from a stranger an authority to draw, purporting to be signed by the cashier of a bank, and transmits it without making proper inquiries in respect to its genuineness, and it is acted upon by the sendee, and turns out a forgery. The principal is liable for the negligence of the agent.³

§ 494. The damages recoverable against a telegraphic company in an action of tort, for negligence in transmitting and delivering a false and fraudulent message, are such as result proximately and naturally from the wrongful act.⁴ The plaintiff recovers the damages he has sustained through the defendant's negligence;⁵ he does not recover as damages a loss sustained by the fraudulent act of a third person, who finds his opportunity in the act of negligence. *E. g.*, Brown leaves at defendant's office in Chicago a message to be sent to plaintiff at Rochester, requesting the latter to send him \$500. Through the defendant's negligence in transmitting the message the amount is changed to \$5,000; and the plaintiff, supposing the message accurate, sends to Brown that amount, and he appropriates the same to his own use and absconds.⁶ Here the defendant's negligence was not the proximate cause of the loss.⁷ The law regards the direct and immediate cause of the loss.⁸ It allows the damages sustained, where the defendant's negligence defeats a sale of goods;⁹ or where it prevents a purchase;¹⁰ or where it

¹ Johnson v. Clark, 39 N. Y. 216.

² Beach v. Raritan & Del. Bay R. R. Co., 37 N. Y. 457; citing Potter v. Hopkins, 25 Wend. 417; Renard v. Sampson, 12 N. Y. 566.

³ Elwood v. Western Union Tel. Co., 45 N. Y. 549; Lowery v. Western Union Tel. Co., 60 N. Y. 198.

⁴ Elwood v. Western Union Tel. Co., *supra*.

⁵ Webb v. R. W. & O. R. R. Co., 49 N. Y. 420.

⁶ Lowery v. Western Union Tel. Co., 60 N. Y. 198.

⁷ McGrew v. Stone, 53 Penn. St. 436, 440; Crain v. Petrie, 6 Hill, 522; Bigelow v. Reed, 51 Me. 325.

⁸ People v. City of Albany, 5 Lans. 524.

⁹ Squire v. W. U. Tel. Co., 98 Mass. 232.

¹⁰ Rittenhouse v. Ind. Line of Tel., 44 N. Y. 263.

induces a shipment of goods, not called for by the telegram as left for transmission.¹ The injured party is entitled to recover the damages resulting naturally from the defendant's negligence, or breach of his contract.

¹Leonard v. N. Y., etc., Tel. Co., 41 N. Y. 544 : the rule of damages is much considered in this case.

CHAPTER IX.

COMMON CARRIERS.

THE internal and external carrying trade of a highly commercial people forms no inconsiderable element in the national prosperity. To the carrier, as the agent of commerce, is committed the wealth of merchandise shipped on the seas from port to port, and carried along all our rivers, railroads, canals and lakes. In the interest of a business whose influence is so extensive in civil life, the law accords to this subject an important place in our system of jurisprudence, giving to it a consideration proportioned to the numerous and various relations which it involves.

§ 495. *Who are Common Carriers.* A person is not a common carrier who on a single occasion sends his servant to transport goods belonging to a particular individual, from one place to another, as from Albany to Schenectady.¹ To constitute him a common carrier, he must be one who, as a regular business, undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place.² He is not a common carrier, unless his employment be to carry goods generally for any one, so as to imply a public engagement to serve all persons alike on being tendered a suitable reward.³ In other words, if he undertake for hire or reward to transport the goods of all persons, indifferently, that is, of all such persons as choose to employ him, from place to place, he is a common carrier;⁴ and his employment is of such a public character as obliges him to accept business whenever it is offered to him on reasonable terms.⁵

The character is assumed by the manner in which a man conducts his business: he is a common carrier where it is his practice to carry

¹ *Satterlee v. Groat*, 1 Wend. R. 272.

² *Blanchard v. Isaacs*, 3 Barb. R. 338; *Bissell v. New York Cent. R. R. Co.*, 29 Barb. 602, 612; *The Dan*, 40 Fed. Rep'r, 691; *Johnson v. Pensacola, etc.*, R. R. Co., 16 Fla. 623.

³ *Trent and Mersey Nav. v. Wood*, 3 Esp. R. 127; *Story on Bailm.* § 495.

⁴ *Gisbourne v. Hurst*, 1 Salk. R. 249; *Dwight v. Brewster*, 1 Pick. R. 50; *Varble v. Bigley*, 14 Bush (Ky.), 698.

⁵ *Alexander v. Greene*, 3 Hill, 9, 20.

parcels, generally, for hire; or where he carries goods habitually for hire, in connection with another and more direct business.¹ A man is not a common carrier, unless he holds himself out to the world in that capacity.² And yet he may assume the obligations of a common carrier by a contract.³

§ 496. The burden of proof rests with the party seeking to charge a person or a company as a common carrier. Where a steamboat company has been in the habit of carrying money for hire, or have held themselves out to the public as common carriers of money and bank bills, they are answerable in that capacity.⁴ And the company is not liable for the loss of packages of bank bills, entrusted to the captain of their boat, unless it is shown that they have made the carriage of such packages a part of their ordinary business; in the absence of such proof, a delivery of a package of bank bills to the captain to be carried, from one point to another on his trip, is to be deemed a personal trust; especially where the compensation is a personal perquisite, and the package is delivered to the captain as a trustworthy person, without authority to receive and carry such packages.⁵ Carriers, like other people, have the right to limit the scope of the business they carry on; they are not obliged to enter upon the business of transporting money packages.⁶

§ 497. No person is a common carrier, in the sense of the law, who is not a carrier for hire. It is not necessary that the compensation should be fixed by an agreement, and it is not necessary that the goods or property should be entered upon a freight list, or that the contract should have any written form. The law implies the contract from the delivery of the goods, properly addressed;⁷ from a delivery which places them within the carrier's custody for transportation.⁸ A delivery to his agent or servant of such goods as it is the carrier's custom

¹ *Gordon v. Hutchinson*, 1 Watts and Serg. 285; *Sheldon v. Robinson*, 7 N. H. 157; *Dwight v. Brewster*, 1 Pick. R. 50; 29 Barb. 602, 612; *Hale v. N. J. Steam Nav. Co.*, 15 Conn. 539.

² *Allen v. Sackbrider*, 37 N. Y. 341; *Fish v. Clark*, 49 N. Y. 122.

³ *Stephens and Condit Transp. Co. v. Tuckerman*, 33 N. J. (Law) 543.

⁴ *Citizens' Bank v. Nantucket S. Co.*, 2 Story R. 16.

⁵ *Sewell v. Allen*, 6 Wend. 335; S. C. 2 Wend. 327; *Blanchard v. Isaacs*, 3 Barb. 388. If the driver of a stage is allowed, as a part of his compensation, to carry packages, and he does so, and the agreement is not known to the party delivering a parcel to be carried, the employers are liable. *Bean v. Sturtevant*, 8 N. H. 146.

⁶ *Halsey v. Brown*, 3 Day R. 346; *Renner v. Bank of Columbia*, 9 Wheat. 590.

⁷ *Citizens' Bank v. Nantucket S. Co.*, 2 Story, 16; *Harmon v. N. Y. and Erie R. Co.*, 28 Barb. 323; *McCotter v. Hooker*, 8 N. Y. 497; *Sewell v. Allen*, 6 Wend. 335, 350.

⁸ *Merriam v. Hartford and N. H. R. Co.*, 20 Ct. 354; *Trowbridge v. Chapin*, 23 Ct. 595.

to receive, is a delivery to himself; and this is so where the goods are so nearly within the line of the business that the person delivering them has reason to believe that they are fairly within the scope of the agent's authority to receive and transport.¹

§ 498. A carrier of passengers is liable as a common carrier of their baggage. Thus, a company using steamboats and railroads for the transportation of passengers and their baggage, are liable as common carriers for damages happening to the baggage from a defect in the vehicles or machinery used, although the company is not chargeable with actual negligence, or want of skill, in securing the safety of the baggage; and nothing will excuse the company but inevitable accident arising from superhuman causes, or the acts of the enemies of the country.² The rule fixing the responsibility of common carriers, does not apply to the carrying of passengers or intelligent beings: and so the company are not liable in damages for injuries to passengers, where they have done all that human care and foresight can do to insure their safety.³

§ 499. We have two classes of common carriers, namely, carriers by sea, and inland carriers, by land or water; and in the aggregate body are included railroad companies, the owners of stage-wagons and coaches, who carry goods as well as passengers for hire; wagoners, teamsters, cartmen, the masters and owners of ships, vessels and all water-craft, including steam vessels, belonging to internal as well as coasting and foreign navigation, lightermen, ferrymen, and express companies; all who engage in business as general carriers.⁴ It is the mode of transacting the business, and not the ownership of the conveyances employed in it, that renders a party liable as a common carrier.⁵

§ 500. Cartmen, draymen and porters are not common carriers, when they are employed by a person accompanying them, or continuously by a single firm;⁶ and they are common carriers when they make it their business to carry goods or packages, from one part of the town to another, for so much a load or parcel, at the request of any person; they come within the general definition, and have been adjudged liable as

¹ *Halsey v. Brown*, supra, and *Renner v. Bank of Columbia*, supra, and *Sewell v. Allen*, 6 Wend. 335, 350. See *Isaacson v. New York Cent. & H. R. R. Co.*, 94 N. Y. 278, 285.

² *Camden and Amboy R. and T. Co. v. Burke*, 13 Wend. 611.

³ *Boyce v. Anderson*, 2 Peters U. S. R. 150; *Christie v. Griggs*, 2 Campb. 80; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126.

⁴ 2 Kent's Comm. 598, 599; *Sweet v. Barney*, 23 N. Y. 335.

⁵ *Rogers v. Wheeler*, 43 N. Y. 598; 9 Allen, 47; 20 Vt. 421.

⁶ Ante, § 393 shows the relation in which they stand to their employers; *Robinson v. Dunmore*, 2 Bos. and Pul. R. 417; *Brind v. Dale*, 8 Carr. and P. 207.

common carriers.¹ On the same ground, a city express company, engaged in carrying baggage to and from the different railroad depots, is treated and held liable as a common carrier.² Practically no discrimination can be made between carriers, grounded on the length of the route over which they carry goods or parcels.

§ 501. *The Wagoner.* Formerly, in this country as well as in England, much of the carrying business by land was done by wagoners and teamsters, who followed it as a regular employment, holding themselves out to the community as ready to receive and carry any goods that might be offered to them on their route;³ and they were held common carriers; the word *common* being used to distinguish them from one who undertakes for hire, to carry goods for another, on a particular occasion.⁴ In some of the States, farmers carried their own goods to market, and on their return transported goods into the interior of the State, taking such loads as they could find; and though the carrying of goods in this manner was not their principal business, they were considered common carriers.⁵ Without questioning the authorities to this effect, it deserves to be noticed that a man cannot be held liable as a common carrier unless he engages in the business; that he becomes a common carrier of only that class or line of goods which he assumes to carry, generally, for hire; and that he has a right to withdraw from the business.⁶

§ 502. *Proprietors of Stage Coaches.* Originally the proprietors, running a line of stage-coaches, were not regarded as common carriers in any sense; they carried passengers for a compensation, without making any separate charge on account of their baggage.⁷ Subsequently a

¹ *Robertson v. Kennedy*, 2 Dana, 430; *Dibble v. Brown*, 12 Georgia, 217; *Robinson v. Cornish*, 34 State Rep'r, 695.

² *Richards v. Westcott*, 2 Bosw. 589; *S. C. 7 Bosw. 6*; *Verner v. Sweitzer*, 32 Penn. St. 208; *Parmalee v. Lowitz*, 74 Ill. 116.

³ In this State, before the Erie Canal was opened, goods were usually carried westward from Albany, to the young and thriving towns of middle and western New York, in great wagons drawn by three or four horses, in charge of a competent teamster; and the business was both important and lucrative. There was no other mode of transportation. When Adam Smith's "Wealth of Nations" was first published, 1776, "a broad wheel wagon, attended by two men, and drawn by eight horses, carried and brought trade between London and Edinburgh in about six weeks' time"—a slow-going and yet solid looking picture of olden times.

⁴ *Gisbourne v. Hurst*, 1 Salk. 249; *Cro. Eliz.* 596.

⁵ *Gordon v. Hutchinson*, 1 Watts and S. 285; *Powers v. Davenport*, 7 Blackf. 457; *Lecky v. M'Dermot*, 8 Serg. and R. 500; *Chevallier v. Straham*, 2 Texas, 115.

⁶ *Satterlee v. Groot*, 1 Wend. 272; see discussion in *Alexander v. Greene*, 7 Hill, 533; see *Fish v. Chapman*, 2 Kelly, 349; *McClure v. Richardson*, 1 Rice, 215; *Jenkins v. Pickett*, 9 Yerg. 480.

⁷ *Middleton v. Fowler*, 1 Salk. 282; *Upshare v. Aidee*, 1 Comyns, 25; *Jeremy on Carr.* 11, 13; *Stewart v. London and Northwestern R. Co.*, 3 H. and C. 139.

custom grew up on some routes, of charging freight for the conveyance of all baggage exceeding a certain weight; and under this custom they were soon treated as common carriers of the baggage thus specifically received and carried as freight; and finally as common carriers of all baggage carried with passengers, on the ground that compensation for its conveyance is included in the passenger's fare.¹ There is a tacit understanding to that effect, an implied contract that the fare paid covers baggage.

The proprietor of a line of coaches cannot limit his liability for baggage, by a notice printed on a ticket or posted conspicuously in his office; or even by a notice brought home to a passenger's attention. He is not allowed to exempt himself from his legal liability.² His liability can only be qualified by a contract.

The carrier's implied contract is to carry his passenger's luggage;³ which is understood to include such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables carried in trunks for other purposes, such as sale and the like.⁴ With much liberality in determining the things which may be carried as baggage,⁵ the law does not hold the carrier liable for such articles as cannot be fairly thus carried; such as silver plate, samples of goods, or merchandise, packed with baggage, or money exceeding the amount required for traveling expenses.⁶ There is no implied understanding that articles like these may be carried as baggage. Received as freight or with knowledge of their character and value, the carrier is liable for them.⁷

§ 503. In respect to their principal business, the proprietors of a line

¹ *Richards v. London, B. & S. C. R. Co.*, 7 C. B. 839; *Great Western R. v. Goodman*, 12 C. B. 313; 11 Eng. L. and Eq. 546; *Brooke v. Pickwick*, 4 Bing. 218. Ante, § 498; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Pardee v. Drew*, 25 Wend. 459; *Dexter v. Syracuse, B. & N. Y. R. R. Co.*, 42 N. Y. 326. *Isaacson v. New York Cent. & H. R. R. Co.*, 94 N. Y. 278, 283.

² *Clark v. Faxon*, 21 Wend. 153; *Hollister v. Nowlen*, 19 Wend. 234; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Cole v. Goodwin*, 19 Wend. 251; *Blossom v. Dodd*, 43 N. Y. 264; *Brook v. Pickwick*, 4 Bing. R. 218; *Jones v. Voorhees*, 10 Ohio, 145.

³ *Powell v. Myers*, 26 Wend. 591.

⁴ *Orange Co. Bank v. Brown*, 9 Wend. 85; *Pardee v. Drew*, 25 Wend. 459.

⁵ *Merrill v. Grinnell*, 30 N. Y. 594; *Van Horn v. Kermit*, 4 E. D. Smith, 453; *McCormick v. Hudson River R. R. Co.*, Id. 181, 10 How. Pr. 330.

⁶ *Dexter v. Syracuse, B. & N. Y. R. R. Co.*, 42 N. Y. 326; *Bell v. Drew*, 4 E. D. Smith, 59; *Hawkins v. Hoffman*, 6 Hill, 586; *Grant v. Newton*, 1 E. D. Smith, 95; 30 N. Y. 594. *Chicago, etc., R. R. Co. v. Boyce*, 73 Ill. 510; *Blumenthal v. Maine Cent. R. R. Co.*, 79 Me. 550; *Michigan Cent. R. R. Co. v. Carrow*, 73 Ill. 348.

⁷ *Stoneman v. Erie Railroad Co.*, 52 N. Y. 429; *Hannibal Railroad v. Swift*, 13 Wall. 262; *Sloman v. Great Western R. R. Co.*, 67 N. Y. 208.

of stage coaches are liable as carriers of passengers ; without insuring the absolute safety of their passengers, they do undertake to carry them safely as far as human care and foresight will go ; in other words, they engage for the utmost care and diligence of very cautious persons.¹ We shall consider this liability more fully in its proper place. In respect to such goods, packages and parcels as they carry habitually for hire, they are common carriers, and their liability is the same as if that were their sole business.² They are thus liable, when they engage in the business and hold themselves out to the community as ready and willing to carry such packages or parcels ; and when such goods or parcels are carried on their account.³ It being shown that they are engaged in the business, a delivery to their agent to receive and carry, is sufficient to charge them.⁴ A delivery alone, unaccompanied by such evidence, is not sufficient ; as where the driver of the stage is permitted to carry packages on his own account, and he does not assume to act on behalf of the company ;⁵ and the arrangement is known to the parties dealing with him.⁶ The driver in this case acts as an ordinary bailee for hire.⁷

§ 504. Hackney coachmen are not ordinarily regarded as common carriers, their employment being intended chiefly for the convenience of persons ;⁸ they certainly cannot be charged as common carriers of goods, where they simply carry passengers who retain in their custody packages and parcels, or articles of clothing.⁹ And yet where it is their business to carry passengers and their baggage, after the manner of a stage coach, there does not appear to be any good reason for exempting them from the liability of carriers. Cabmen and the proprietors of an omnibus, employed in like manner, stand upon the same footing ; they are common carriers of the baggage of passengers, when they receive and carry it in the due course of their business. The fact that

¹ *Camden & Amboy R. & T. Co. v. Burke*, 13 Wend. 611; *Sharp v. Grey*, 9 Bing. 457.

² *Dwight v. Brewster*, 1 Pick. 50; *Allen v. Sewall*, 2 Wend. 327; S. C. 6 Wend. 335; *Jones v. Voorhees*, 10 Ohio, 145; *Merwin v. Butler*, 17 Conn. 138; *Powell v. Mills*, 30 Miss. 231; *Ante*, § 496.

³ *McHenry v. Railroad Co.*, 4 Harr. (Del.), 448; *Beekman v. Shouse*, 5 Rawle, 179; *Middleton v. Fowler*, 1 Salk. 282; *Blanchard v. Isaacs*, 3 Barb. 388.

⁴ *Witbeck v. Schuyler*, 44 Barb. 469; 39 N. Y. 34; *Ball v. N. J. S. Co.*, 1 Daly, 491.

⁵ *Bean v. Sturtevant*, 8 N. H. 146; *Butler v. Basing*, 2 Carr. and P. 614; 3 Barb. 388.

⁶ *Allen v. Sewall*, *supra*; *Mayall v. Boston & Maine R. R. Co.*, 19 N. H. 122; *F. & M. Bank v. C. T. Co.*, 23 Vt. 186; *King v. Lenox*, 19 John. 235.

⁷ *Sheldon v. Robinson*, 7 N. H. 157.

⁸ *Upshare v. Aidee*, 1 Comyns, 25; *Acton v. Heaven*, 2 Esp. 533.

⁹ *Tower v. U. & S. R. R. Co.*, 7 Hill, 47.

they carry over a short route, or to any point within the limits of a town, should not prevent them from being treated as public carriers.¹

§ 505. *Ferries.* In this State only those who are properly licensed are permitted to keep a ferry, and transport for hire persons or goods and chattels over any river, stream or lake.² The State has the right to and does provide a means of regulating the business, with a view to secure the protection of the public.³ The statute law does this, without undertaking to prescribe rules, fixing the ferrymen's liability for his acts of negligence; his liability is therefore to be ascertained from the common law.⁴

A ferryman is a carrier of passengers, and as such under the usual obligation to use the highest care in every part of his business—an obligation imposed by the common law, and quite independent of any personal contract.⁵ He is bound to employ a safe and sufficient boat, with suitable platforms and conveniences for the ingress and egress of passengers; a duty much varied in details, by the situation and circumstances of the ferry.⁶ He is bound also for the use of the highest skill and care in the management or navigation of his boat; and this duty becomes still more strict where his boat is propelled by steam.⁷

Is the ferryman a common carrier? He is when he acts in that capacity. He is certainly, in respect to those goods and chattels which he takes into his custody, so that he has the entire care of them; and, it is adjudged, that he is not thus liable for the absolute safety of property retained by a passenger in his own custody and under his own control.⁸ The decision consists well with the rule applied where one boat

¹ Dibble v. Brown, 12 Georgia, 217; Parmelee v. McNulty, 19 Ill. 556; Ross v. Hill, 2 C. B. 877; 3 Dowl. and L. 788; Dickinson v. Winchester, 4 Cush. 114; Commonwealth v. Fahey, 5 Cush. 408; ante, § 500.

² Laws of 1890, Chap. 568, § 170, as amended by Chap. 212, Laws of 1891; and by Chap. 686 of Laws of 1892.

³ Gibbons v. Ogden, 9 Wheat, 1; People v. Babcock, 11 Wend. 586. Albany and New York, and perhaps one or two other old cities, have by charter a power over the ferries within their limits. Aikin v. Western R. Co., 28 N. Y. 370; Costar v. Brush, 25 Wend. 628; 10 Barb. 223; 32 Barb. 102.

⁴ Miller v. Pendleton, 8 Gray, 547.

⁵ Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 133; Bretherton v. Wood, 3 Brod. and Bing. 54; Philadelphia & Reading R. R. Co. v. Derby, 14 How. U. S. 483.

⁶ Hazman v. Hoboken L. I. Co., 2 Daly, 130; S. C. 50 N. Y. 53; McPadden v. N. Y. Central R. R. Co., 44 N. Y. 478; Caldwell v. N. J. Steamboat Co., 47 N. Y. 282. See Loftus v. Union Ferry Co., 84 N. Y. 455.

⁷ Carroll v. Staten Island R. R. Co., supra; and Caldwell v. N. J. Steamboat Co. supra.

⁸ Wyckoff v. Queens Co. Ferry Co., 52 N. Y. 32; Harvey v. Rose, 26 Ark. 3; S. C. 7 Amer. R. 595; Yerkes v. Sabin, 97 Ind. 141. A ferryman is not a common carrier unless he carries for hire: Self v. Dunn, 42 Ga. 528.

is engaged in towing another which is left in the possession of its owner.¹ If a man drive a horse and wagon on a ferryboat and retain them under his control, the ferryman cannot fairly be charged with the full liabilities of a common carrier of the property. Both parties have duties to perform in respect to it; the owner is bound to preserve it with all reasonable care; and the ferryman is bound to extreme diligence and care to provide a sufficient boat and suitable guards, barriers and appliances for the safe transportation of the property, and for the diligent use of all the means in his power to insure its safety. He is liable for any damages or loss arising from his neglect;² and he does not insure the safety of property retained by the owner under his own hand, or worn upon his person.³

§ 506. Many writers and some decisions hold the ferryman liable as a common carrier for the safety of horses and carriages received and transported by him in the usual manner; and they base his liability upon these grounds: first, his right to place them on the boat where he deems proper, and under such regulations and restrictions as may enable him to secure their safe transit; and second, the similarity between his situation and that of a carrier along the river, together with the difficulty of discriminating between carriers of property up and down the stream, and carriers from one shore to the other.⁴ By common consent, the law must be applied to all carriers alike, under like

¹ *Ante*, § 480; *Milton v. Hudson River S. Co.*, 37 N. Y. 210; *Brown v. Clegg*, 63 Penn. St. 51.

² *White v. Winnisimmet Co.*, 7 Cush. 155; *Clark v. Union Ferry Co.*, 35 N. Y. 485; *Willoughby v. Horridge*, 12 C. B. 742; *Walker v. Jackson*, 10 Meeson and W. 161; *Wyckoff v. Queens Co. Ferry Co.*, 52 N. Y. 32.

³ *Wyckoff v. Queens Co. Ferry Co.*, 52 N. Y. 32; *Cohen v. Hume*, 1 McCord, 439.

⁴ *Wilson v. Hamilton*, 4 Ohio St., 722. This was an action to recover of the defendant as a common carrier the value of a wagon and four horses and harness lost in crossing the Ohio river on the defendant's ferryboat. The court held the defendant, a ferryman occupying a position in a line of public travel, a common carrier, and as such subject to all the liabilities incident to that position; that he is a common carrier of living animals; and, grudgingly, that his liability may be qualified where the owner of a horse and wagon selects his own place upon the boat and retains the exclusive custody of them. In *Fisher v. Clisbee*, 12 Ill. 344, the same rule was held in respect to a horse and harness and buggy driven by a servant upon the defendant's ferryboat—a ferry across the Illinois river, at Lacon. The court considered the property to be in the ferryman's possession, and under his orders; meanwhile the owner's servant held the horse by the head. See *Angell on Carriers*, §§ 82, 109, 130, 165.

POWELL v. MILLS, 37 Miss. 691. OPINION BY HANDY, J.

"This action was brought by the plaintiffs in error against the defendants, as ferrymen, to recover for the damage done to certain goods in the care of the plaintiffs, as proprietors of a line of stage-coaches for transportation, by the stage-coach being

circumstances; if the owners of a steamboat run it up or down a river as a carrier of freight, they are justly liable as common carriers of

thrown from the defendants' ferryboat, in consequence of which the goods were wet and became damaged.

"The facts, as set forth in the bill of exceptions, are in substance: that the defendants were in the habit of taking the stage-coaches of the plaintiffs across their ferry for hire, and on the occasion when the damage complained of was done, the plaintiffs' driver drove the coach and horses into the ferryboat, then got off his seat, after he had tied up the lines, taking his bucket to water the horses. The ferryman noticed the driver watering the horses. No one was holding the horses when they started out of the boat, the driver being engaged in watering those in front. The horses ran out of the boat before it reached the landing, and the coach was thrown into the river. After the driver left his seat he had no hold of the horses or of the lines until the horses ran out. The ferryman was talking to the driver whilst he was watering the horses, and it does not appear that he made any effort to quiet them or prevent injury being done by them; the driver was taken into the river, as if taken by the horses in his efforts to stop them. The ferry was a public one, kept by the defendants, who received compensation by contract with the plaintiffs for transporting their stage-coaches and horses; and it is admitted that the goods in the plaintiffs' coach were injured by their submersion.

"A verdict was rendered for the defendants, and thereupon the plaintiffs moved for a new trial; 1st, Because the verdict was contrary to law and the evidence; and 2nd, Because erroneous instructions were given by the court for the defendants; and the judgment was reversed, and the cause remanded for a new trial. * * *

"After the stage-coach and horses were received into the ferryboat, they were in the charge and keeping of the ferryman, and it became his duty to make such provisions as were required from the nature of the property committed to his charge to insure its safe transportation. This indeed is the very substance of the obligation incurred by the nature of the business. The responsibility of safely keeping the property during the passage across the river, and of employing all the means necessary to that end, was transferred from the owner to the carrier by the fact of receiving it into the ferryboat; and it devolved upon the defendants to show that the accident which caused the damage occurred by some of the means above mentioned, as exempting them from liability.

"There is no pretense that there was any exception in the contract exempting them from responsibility in such a case; or that the accident was inevitable, in the proper legal sense of the term, or could not have been prevented by the construction of barriers around the boat, or the employment of servants to secure the horses, or by causing them to be loosed from the coach. It was the duty of the defendants to take these precautions in receiving the property, and becoming bound to transport it safely, and they are responsible for the damage unless they were relieved from their responsibility by the plaintiffs', or their driver, taking upon themselves to keep the horses safely. But there is no positive evidence of such an undertaking, nor can it be justly inferred from the conduct of the driver on the occasion.

"It appears that the driver drove the horses attached to the stage coach into the boat, and after tying the lines, he left the box and proceeded to water the horses. He did not continue to hold the lines, nor say anything showing that he had taken upon himself the safe-keeping of the horses: and the only circumstance tending to show that they were in his keeping at the time, is the fact that he was carried into the river

horses and cattle which they receive on board for transportation, when they take them into their care and custody.¹ They are thus liable, with this exception: they do not insure against injuries, resulting from the propensities and nature of the animals, and which cannot be prevented by foresight, diligence and care.² On the other hand, when a common carrier, a railway company for example, makes a special contract for the transportation of cattle, leaving the owner to put them on board and accompany and take care of them, the agreement creates a relation different from that which arises when the carrier takes the cattle into his exclusive custody.³ The carrier does not assume the entire custody of the cattle, and he does not come under the full responsibility of a common carrier; indeed, he does not, in the absence of a special contract, become liable for damages caused by an occurrence incident to the carriage of live animals in a railroad car, where he could not have prevented the injury by the exercise of diligence and care.⁴

by the horses. But this might have been done by efforts to stop them, by seizing the bridle, which he would very naturally use, as he was standing before them and watering them when they started off. It is not sufficient to show that he had undertaken to keep them safely, but is more properly to be regarded as an effort to aid the ferryman in performing his duty: and the fact that he left them and proceeded to get water for them immediately after driving them into the boat, tends much more strongly to prove that they were in the keeping of the ferryman.

"There appears therefore to be nothing in the circumstances sufficient to exempt the defendants from the responsibility resting upon them from the nature of their undertaking."

The contract implied by law must be ascertained from the actual intent of the parties. It is inferred from the facts; and it is quite clear that a person driving a team harnessed before a wagon, loaded with goods, does not ordinarily intend to deliver the property into the custody of the ferryman. He keeps the reins in hand; and he does not so entrust the ferryman with the goods, as to charge him for their loss by theft. So where a man goes on board the boat, with a pack on his back, he does not usually place his goods in the keeping of the ferryman. And yet in each of these cases the ferryman has, in a general sense, possession of both the individuals and their property, and is liable for any loss arising through his default in duty. See *Peixotti v. M'Laughlin*, 1 Strob. 468; *Dill v. South Carolina R.* 7 Rich. 158.

¹ *Merritt v. Earle*, 31 Barb. 38; S. C. 29 N. Y. 115, relates to the liability of a carrier by steamboat on the Hudson, for a span of horses received and carried as freight.

² *Penn v. Buffalo & Erie R. R. Co.*, 49 N. Y. 204; *Cragin v. N. Y. C. R. Co.*, 51 N. Y. 61; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *Bamberg v. South Carolina R. R. Co.*, 9 S. C. 61; *McKoy v. K. D. & M. R. R. Co.*, 44 Iowa, 424.

³ *Steiger v. Erie Railway Co.*, 5 Hun. (12 S. C. N. Y.), 345; *Welsh v. Pittsburg R. R.* 10 Ohio St. 65; *East Tenn. R. v. Whittle*, 27 Ga. 535. If the cattle are destroyed by a fire set from a lantern used by a servant of the shipper in charge of the cattle the railroad company is not liable. *Hart v. Chicago & Northwestern Ry. Co.*, 69 Iowa, 485.

⁴ *Clarke v. Rochester & S. R. Co.*, 14 N. Y. 570; *Gabay v. Lloyd*, 3 B. and C. 793; *Lawrence v. Aberdeen*, 5 B. Ald. 107; *Illinois Cent. R. R. Co. v. Bralsford*, 13 Ill. App. 251; *Boehl v. Chicago, M. & St. P. R. R. Co.*, 44 Minn. 333. The common law

By analogy, a ferryman who does not assume the exclusive custody of carriages and horses driven on board his boat and held by the driver, should not be held to the full responsibility of common carriers; and conceding him to stand in the relation of a common carrier, he should not be held liable for damages resulting solely from the uncontrollable instincts of live animals.¹

§ 507. The ferryman must exercise a high degree of care in receiving either passengers or property on board of his boat;² and in landing them.³ He must also protect horses and cattle received on his boat, from loss or injury, by the use of suitable chains and guards.³ He must take every reasonable precaution to guard against casualties and dangers incident to the situation; and he is not allowed to excuse himself from liability, by showing that his boat has been long used, without accident, and without any barrier to prevent cattle from falling off.⁴ He is not allowed to show, in excuse for his negligence, that it is customary with other carriers to conduct their business with equal negligence.⁵ And yet there are cases in which it is admissible to show that the carrier's boat was properly constructed or equipped, and where the testimony must have some reference to the usual mode of constructing or equipping like boats.⁶

On account of his responsibility, the ferryman has the right to regulate the mode of receiving and placing goods and chattels on his boat;⁷

liabilities of carriers attach to the carriers of animals, modified only so far as the cause of damage for which recompense is sought is a consequence of the conduct or propensities of the animals undertaken to be carried. *Bamberg v. South Carolina R. R. Co.*, 9 S. C. 61; *McKoy v. K. D. & M. R. R. Co.*, 44 Iowa, 424; *Lindsley v. Chicago, Milwaukee, etc., R. R. Co.*, 36 Minn. 539; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *Louisville & N. R. R. Co. v. Wynn*, 8 Tenn. 320; *Missouri Pac. R. R. Co. v. Cornwall*, 70 Texas, 611; *Gulf, C. & S. F. R. R. Co. v. Ellison*, 70 Texas, 491.

¹ *Cragin v. N. Y. Central R. Co.*, *supra*, 51 N. Y. 61; *Smith v. N. H. & N. R. Co.*, 12 Allen, 531.

² *Pomeroy v. Donaldson*, 4 Mo. 33; *Hazman v. Hoboken Land & Imp. Co.*, 2 Daly, 130; *S. C. 50 N. Y. 56*; *Miles v. Jones*, 1 McCord, 157.

³ *White v. Winnisimmet*, 7 Cush. 155; *Clark v. Union Ferry Co.*, 35 N. Y. 485; *Willoughby v. Horridge*, 12 C. B. 472; *Walker v. Jackson*, 10 M. and W. 161; 5 Hun, 523; *Simmons v. New Bedford Co.*, 97 Mass. 361, 368.

⁴ *Lewis v. Smith*, 107 Mass. 534; 8 Gray, 547; as to the effect of proof of long use without accident on the question of negligence, see *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Loftus v. Union Ferry Co.*, 84 N. Y. 455; *Burke v. Witherbee*, 98 N. Y. 562; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Hubbell v. City of Yonkers*, 104 N. Y. 434, 439; *Lafin v. Buffalo & Southwestern R. R. Co.*, 106 N. Y. 136.

⁵ *Cleveland v. N. J. Steamboat Co.*, 5 Hun, 523.

⁶ *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Crocheron v. North Shore & Staten Island Ferry Co.*, *id.* 656; commented on in 5 Hun, 523, 527.

⁷ *Claypool v. McAllister*, 20 Ill. 504; *ante*, § 506.

and a traveler has a right to rely upon his judgment.¹ For the same reason, it rests with the ferryman to determine as to the safety of attempting a trip, in a storm or in a freshet; and it is agreed that he is not liable for losses caused by a storm or a tempest, arising after his boat is under way.² He is bound to transport goods or chattels during the day and until the close of business hours in the evening, unless he is excused by the weather or the flood, rendering the passage dangerous.³

§ 508. *Masters of Vessels.* The master of a vessel also comes within the description of a common carrier. Although he receives his salary from the owners, it does not effect or annul his common law liability, if he does not keep the goods delivered into his custody safely. This rule was first adjudged in the reign of Charles the Second, on the following grounds: First, because he takes a reward and the usage is, that half wages are always paid him before he goes out of the country. Second, that he may make a reserve and caution for himself. Third, that no difference can be assigned between him and a hoyman, common carrier, or innholder. Fourth, that he is rather an officer than a servant, having power to impawn the ship, and to sell *bona pertinere*. In effect, too, his reward is paid by the merchants upon the same condition as freight is to the owners; namely, that such freight is earned without which his wages would not be due.⁴

This decision was made in *Mors v. Slue*, which was an action brought against the master of a ship for goods delivered into his custody, and stolen from the ship without his fault, by persons pretending themselves to be officers with a warrant to search, and the defendant, who had been used to receive the freight and make contracts for transporting goods, was held responsible as master.⁵

§ 509. The master is liable to the merchant from whom he receives goods for transportation, precisely to the same extent and in the same form of action as the owner; but he is liable in a different character and on a different ground.⁶ The owner is liable by reason of his public employment and the profit derived from it for freight. The master is liable

¹ *Pomeroy v. Donaldson*, 4 Mo. 36. The ferryman must not overload his boat.

² *Cook v. Gourdin*, 2 Nott and McCord, 19.

³ *Pate v. Henry*, 5 Stew. and P. 101.

⁴ *Jeremy's Law of Carriers*, 8; the master is liable for the negligent acts of those under his authority; *Kennedy v. Ryall*, 67 N. Y. 379. The liability of the masters of a vessel for its safe management is not affected by the fact that the vessel is chartered by third persons for the particular occasion. *Cuddy v. Horn*, 46 Mich. 596. See *Scarff v. Metcalf*, 107 N. Y. 211, 217; *Robinson v. Chittenden*, 69 N. Y. 525.

⁵ *Ventr. R.* 190, 238; 2 *Ld. Raym.* 919; 2 *Kent's Comm.* 599.

⁶ *Patten v. Magrath*, 1 *Rice R.* 162.

on his own contract for the transportation of the goods and by virtue of his taking charge of them for that purpose. The liability of the owners is implied by law, from the nature of their employment, on the ground of public policy ; while that of the master, who is not an owner, and receives no part of the freight, seems to arise rather from his express undertaking ; still, on the same ground of policy and in favor of commerce, he is held personally responsible on his contract, even where the owners are known, which is thus far a departure from the general law of principal and agent.¹

Masters of vessels who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port, within the State, or beyond sea, at home or abroad ; and they are answerable, as well by the marine law as by the common law of England, for all losses not arising from inevitable accidents, or such as could not be foreseen or prevented.² In an action of assumpsit on a bill of lading signed by the master, of goods shipped, as from Liverpool to New York, he is answerable for any deficiency in the cargo, whether embezzled or otherwise lost.³ And the rule of damages is their value at the place of destination. In his relation to the shipper or consignee of goods, the master is both a principal and an authorized agent of the owners of the vessel entrusted to him ;⁴ but he is not liable on a bill of lading signed by him, *jointly* with the owners.⁵

§ 510. As between himself and the owners, the master of a vessel is an agent clothed with extensive powers ; authorized to make contracts for supplies,⁶ for repairs to the ship,⁷ for advances to discharge a claim for salvage,⁸ and for the transportation of goods.⁹ Absent from home, on a voyage, or at a port of necessity, he has such powers as are necessary to enable him to protect the property and interests entrusted to his care. Under the stress of necessity he may borrow money in a foreign port, and hypothecate the vessel for its repayment ;¹⁰ or sell her, when that is the only means of preserving for the owners or insurers any part

¹ Patten v. Magrath, 1 Rice R. 162; Price v. Hartshorn, 44 Barb. 655.

² Elliott v. Russell, 10 John. R. 1; Schieffelin v. Harvey, 6 John. R. 171.

³ Watkinson v. Laughton, 8 John. R. 213.

⁴ Kemp v. Coughtry, 11 John. R. 107; Bussey v. Donaldson, 4 Dallas R. 296; 1 Wash. (Cir. Co.) R. 142.

⁵ Sewall v. Allen, 6 Wend. R. 335; 2 Wend. R. 327.

⁶ Sager v. Nichols, 1 Daly, 1. See Kenzel v. Kirk, 37 Barb. 113; McCready v. Thorn, 51 N. Y. 454.

⁷ Provost v. Patchin, 9 N. Y. 235.

⁸ Loback v. Hotchkiss, 17 Abbott Pr. 88.

⁹ Ward v. Green, 6 Cowen, 173.

¹⁰ Reade v. Com. Ins. Co., 3 John. R. 352.

of her value;¹ or acting in good faith, and being unable to consult the owners, he may even sell the cargo, under an absolute or really urgent necessity, to preserve or save its value.² But he cannot justify a sale, where he has the power at hand to send forward the goods safely by another ship, or is able to repair his own and prosecute the voyage. Being unable to prosecute the voyage, or to send forward the goods, he is bound to act for the best interest of all concerned, including the owners of the cargo and the owners of the vessel. He must do what he can for the preservation of the cargo, and it is his duty towards the owners of the vessel, to earn freight if he can.³

§ 511. *Owners of Vessels.* The owners of vessels employed in the carrying business on our lakes and rivers, or on the high seas, are common carriers of such goods as they hold themselves out to the community as ready to receive and transport from place to place.⁴ It was at one time held in this State that the owners of a vessel transporting goods on the high seas are not common carriers, within the meaning of the rule, subjecting them to all losses or injuries, which arise from any other cause than the act of God, or the enemies of the country; and that in an action against them for loss or damage from any other cause, it should be submitted to the jury, upon the evidence, whether they used ordinary care and diligence.⁵ But this doctrine is in direct conflict with previous decisions of the same court, and it has been since overruled.⁶ In recent cases the carrier upon the high seas is uniformly regarded as a common carrier, in the same manner, and to the like extent, as the carrier upon land, except in so far as his responsibility is limited by statute.⁷

The English decisions are to the same effect, holding the owners of vessels, loading and carrying goods to and from foreign ports, answer-

¹ *Chambers v. Grantzon*, 7 Bosw. 414; 32 N. Y. 685; *Hall v. Ocean Ins. Co.*, 37 Fed. Rep'r, 371; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505, 516.

² *Butler v. Murray*, 30 N. Y. 88.

³ *Searle v. Scovell*, 4 John. Ch. 418; *The Amer. Ins. Co.*, 4 Wend. 45; *Ogden v. Gen. Mutual Ins. Co.* 2 Duer, 204; *Nelson v. Belmont*, 21 N. Y. 36.

The master's duty to send forward the goods by another vessel is only imperative when he is able to secure a vessel in the same or in a contiguous port, within a reasonable distance. *Saltus v. Ocean Ins. Co.*, 12 John. 107; *Treadwell v. Union Ins. Co.*, 6 Cowen, 270; *Hugg v. Augusta Ins. & B. Co.*, 7 How. U. S. 595.

⁴ *Sewall v. Allen*, 6 Wend. R. 335; 2 Wend. R. 327; *The Montana*, 129 U. S. 397.

⁵ *Ayman v. Astor*, 6 Cowen R. 267.

⁶ *Schieffelin v. Harvey*, 6 John. 170; *Elliott v. Rossell*, 10 John. 1.; *Kemp v. Coughtry*, 11 John. 107; *Gould v. Hill*, 2 Hill, 623; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. 136; *S. C.* 11 N. Y. 485; *Wilcox v. Parmelee*, 3 Sandf. 610.

⁷ *Price v. Powell*, 3 Comst. R. 322. See Act of Congress of 1851; *R. S. of U. S.* 831, 832.

able as common carriers.¹ In short, it is deemed a settled point, that masters and owners of vessels are liable in port, at sea and abroad, to the whole extent of inland carriers, unless exempted by the exceptions in the contract of charter-party, or bill of lading, or by statute. Under the marine law the rule of liability is essentially the same.²

§ 512. The employment of a vessel determines its character as a common carrier. Where a ship is not put up to freight, but employed by the owner on his own account, and the master receives goods of another person on board as part of his privilege, taking to himself the freight, the owner is not answerable for the conduct of the master in relation to such goods.³ The shipper thus making a private bargain with the master, is not allowed to hold the owner liable thereon; on the ground that the owner did not actually authorize the contract, nor permit his ship to be advertised or held out for freight.⁴

The master's power to bind the owners is but a branch of the general law of agency.⁵ When the vessel is what is called a general ship, that is, one in which the master or owners engage separately with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination, the master has authority to receive goods on freight, unless prohibited by the presence of the owner exclusively attending to the shipment of the cargo. The owner's presence does not of itself show the master's want of authority.⁶

§ 513. Outside of the usual business in which a vessel is employed, the master has no implied authority to bind his principal. Hence, in order to render the owner of the vessel liable on the contracts of the master, it must be proved that the vessel was in the owner's employment, that the master was appointed by him, and that he acted in making such contracts within the scope of his authority.⁷ A private contract with the master to carry a money parcel, the carriage of which is not within the vessel's ordinary business, does not render the owners responsible.⁸

¹ *Fragano v. Long*, 4 Barn. & Cres. R. 219; *Elliott v. Rossell*, 10 John. R. 7; 2 Kent's Comm. 609.

² *Elliott v. Rossell*, 10 John. R. 8; *McClure v. Hammond*, 1 Bay's R. 99; *Bell v. Reed*, 4 Binn. R. 127; *The Montana*, 129 U. S. 397; *The Niagara v. Cordes*, 62 U. S. 7; *The Lady Pike*, 88 U. S. 1.

³ *King v. Lenox*, 19 John. R. 235.

⁴ *Walter v. Brewer*, 11 Mass. R. 99.

⁵ *Lloyd v. Grubert*, 10 Jur. N. S. 349; 33 L. J. Q. B. 241; 12 W. R. 953; 6 B. & S. 100, 129; 33 L. J. Q. B. 74.

⁶ *Ward v. Green*, 6 Cowen, 173, 176.

⁷ *Reynolds v. Tappan*, 15 Mass. R. 370; *The Schooner Freeman v. Buckingham*, 18 How. U. S. 182. See *Armour v. Mich. C. R. Co.*, 65 N. Y. 111.

⁸ *Allen v. Sewall*, 2 Wend. 327; S. C. 6 Wend. 335. In this case a package of bills was delivered to the master of a steamboat at New York for Albany; and it appeared that the carriage of such packages was not a part of the boat's ordinary business.

§ 514. There is no distinction between the owners of ships carrying goods on the high seas and the owners of steamboats and other craft that ply upon our inland waters as carriers for all persons indifferently; the same rule of responsibility attaches to a carrier by water as to a carrier by land.¹ The main difference in their liability arises out of the United States statute, and the exceptions so generally inserted in bills of lading exempting the carrier from liability for certain losses caused by the perils or dangers of the sea, rivers or lakes.²

The owners of boats transporting goods or merchandise on the canals, for the public generally, are common carriers;³ and they are not common carriers, or liable as such, unless they are engaged in the carrying business, as a general or public employment.⁴ The owner assumes the character when he enters upon the business; his liability does not much depend upon his interest in the boats, or upon the means by which the business is carried on. Hoymen and barge owners and wharfingers, employed habitually in carrying goods for all persons indiscriminately for hire, are considered common carriers, and subject to the liabilities incident to the business.⁵ But a wharfinger is a common carrier only where he undertakes the duty of carrying goods in lighters to and from vessels in the river; he is not ordinarily a carrier.⁶ So a common bargeman is a common carrier, when he is accustomed to carry goods for hire for the public generally, as from London to Milton and other places in Kent.⁷

§ 515. Our railroads have within quite modern times occupied nearly all the great lines of inland transportation. The corporations constructing and operating them, have become carriers on a great scale; they advertise for freight; they make known the terms of the carriage; they provide suitable vehicles, and appoint convenient places for receiving and delivering goods; and as a legal consequence of these acts, they have become common carriers of merchandise, and are subject to the provisions of the common law applicable to carriers. They hold them-

¹ Elliott v. Rossell, 10 John. R. 1; Price v. Hartshorn, 44 Barb. 655; Sears v. M'Arthur, 21 Wend. A. 190; Bell v. Reed, 4 Binn. R. 127; 6 Wend. 335; Hastings v. Pepper, 11 Pick. R. 81; Crosby v. Fitch, 12 Conn. R. 410; Kemp v. Coughtry, 11 John. R. 107.

² The effect of the statute and of special contracts will be considered in another connection; post, §§ 556-560.

³ Arnold v. Hallenbake, 5 Wend. R. 33; Fairchild v. Slocum, 19 Wend. R. 329.

⁴ Fish v. Clark, 2 Lansing, 176; S. C. 49 N. Y. 122.

⁵ Jeremy's Carriers, 7, 8, 9; Ingate v. Christie, 3 C. and K. 61; Dale v. Hall, 1 Wils. R. 281.

⁶ Maving v. Todd, 1 Stark. R. 59; Platt v. Hibbard, 7 Cowen, 497.

⁷ Rich v. Kneeland, Cro. Jac. 330.

selves out to the community as ready to carry goods and produce or freight, and they come under the usual description and responsibilities of common carriers for hire.¹

§ 516. Express companies organized as joint-stock companies, or acting as partners and engaged in the business of carrying money parcels and goods over fixed routes, are common carriers. They undertake to transport and deliver goods for hire, though they do not own the roads or cars or boats employed in the transportation. They are more than forwarders; their contracts bind them for the carriage and delivery of the goods, and they are therefore held responsible as carriers;² common carriers of that class of packages and goods which they are accustomed to carry, and hold themselves out to the community as ready and willing to receive for transportation.³ At first they carried packages of coin, bullion, bank notes, commercial paper, and like articles of considerable value, occupying but a small space; by degrees they have extended the business so as to include goods and things of greater bulk.⁴ They have also added to it new features, and assumed other duties not attaching to an ordinary common carrier; such as taking a bill for goods, or a negotiable note, for collection.⁵ We shall see presently that their liability as carriers is very generally modified by an express contract.

§ 517. An agreement by a private person to carry and deliver goods safely, renders him responsible for the goods;⁶ it binds him according to the true intent of the parties. Where the master of a storeship in the king's service takes in the bullion of a private merchant on freight, as from Gibraltar to Woolwich, giving a receipt for the delivery of the same (the act of God and the king's enemies only excepted), he assumes the responsibility of a common carrier and is liable for the loss of the

¹ Camden & Amboy R. & Transp. Co., 13 Wend. 611; Weed v. Saratoga & S. R. Co., 19 Wend. 534; Thomas v. Boston & Prov. R. Co., 10 Metcalf, 472; Burtis v. Buffalo & State Line R. Co., 24 N. Y. 269; Crouch v. London & Northwestern R. Co. 14 C. B. 255; 7 Railw. Cas. 717.

² Ante, § 335; Belger v. Dinsmore, 51 N. Y. 166; Read v. Spaulding, 5 Bosw. 395; Place v. Union Express Co., 2 Hilt. 19; Sherman v. Wells, 28 Barb. 403; Horlam v. Adams Express Co., 6 Bosw. 235; Merchants' Dispatch Transp. Co. v. Bloch, 86 Tenn. 392.

³ Sweet v. Barney, 23 N. Y. 335; Russell v. Livingston, 19 Barb. 346; Sherman v. Wells, 28 Barb. 403.

⁴ Van Winkle v. Adams Express Co., 3 Robt. 59; Belger v. Dinsmore, 51 N. Y. 166.

⁵ Collender v. Dinsmore, 64 Barb. 457; S. C. 55 N. Y. 200; Palmer v. Holland, 51 N. Y. 416.

⁶ Robinson v. Dunmore, 2 Bos. & Pull. R. 417; Powers v. Davenport, 7 Blackf. R. 497.

bullion, though stolen out of his cabin after the ship's arrival.¹ So the commander of a ship of war has been held liable for not safely keeping and delivering bullion, received by him from a merchant to carry home from a foreign port.² Regarded as a private carrier, he must excuse his failure to deliver the property at the place of destination; and though the contract be invalid, he must surrender the property on demand, or account for it in some way.³ He stands in a situation analogous to that of a person who occasionally entertains travelers for pay, like some of the farmers in a new country, and is held liable for good faith and reasonable diligence, and not responsible as an inn-keeper.⁴

§ 518. II. DUTY OF THE CARRIER TO RECEIVE.

It is the duty of a common carrier, on being tendered a reasonable compensation, to receive and carry all goods offered to him for transportation, within the line of his business. Having room or the means of transporting the goods, he is bound to receive and carry them over his established route; he holds himself out to the community as ready and willing to carry goods for all persons, without limitation; and the law charges him with the duty of fulfilling his engagement with the public. It holds him liable, in an action based on his breach of duty, for a refusal.⁵

It is safe to say that the carrier is ordinarily bound to receive and carry the goods, on being tendered the usual freight paid on like goods over the same route, received and handled in the same manner. Under ordinary circumstances it is fair to assume that the freight usually paid and received, on like goods, is a reasonable compensation.⁶ On some

¹ *Hatchwell v. Cook*, 6 Taunt. R. 577.

² *Hodgson v. Fullerton*, 4 Taunt. R. 787.

³ *Sheldon v. Robinson*, 7 N. H. 157.

⁴ *Perkins v. Picket*, 9 Yerger, 480; *Lyon v. Smith*, 1 Morris, Iowa R. 184.

⁵ *Riley v. Horne*, 5 Bing. 217; *Cole v. Goodwin*, 19 Wend, 261; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *Crouch v. Great Northern R.*, 14 Com. Bench, 255; 25 Eng. L. & Eq. 287; *Merriam v. Hartford R.*, 20 Conn. 354; *Jordan v. Fall River R.*, 5 Cush. 69; *Morton v. Tibbett*, 15 A. & E. 428; *Galena R. v. Roe*, 18 Ill. 488; *New England Express Co. v. Maine Central R. R. Co.*, 57 Maine, 188. *Atchison, etc., R. R. Co. v. Denver, etc., R. R. Co.* 110 U. S. 667; *Johnson v. Pensacola, etc., R. R. Co.*, 16 Fea. 623.

⁶ *Galena R. v. Roe*, 18 Ill. 488; *Lamar v. New York S. Nav. Co.*, 16 Ga. 558. The question of the reasonableness of a rate of charge for transportation by a railroad company is a question for judicial investigation. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418. Although the charter of a railroad company may authorize it "to fix, regulate and receive the tolls and charges by them to be received for the transportation of property," etc., this does not enable the company to charge what it pleases, and abrogate the obligation imposed upon common carriers by the common

routes the rates of freight are as definitely fixed as the price of any staple of merchandise. It is not so fixed on other lines of transportation; and it must also be admitted that the amount ought to depend somewhat upon the liability assumed by the carrier;¹ upon the class or nature of the goods, the mode of handling them, the preparations requisite for their conveyance, and upon the fact that the goods are received only occasionally and in small parcels, or continuously and in large masses.² The rates of toll paid on merchandise passing through the canal are fixed with some reference to the value of the goods; measured only by the weight, corn pays a less toll than wheat, and wheat less than flour. There is much more reason for charging freight with some reference to the value of the goods transported.³

§ 519. Complaints are sometimes made against railroads on the ground of discriminations made in favor of through freight; and these complaints would appear to be just when a road charges one man more than it does another for the conveyance of the same class of goods over the same distance, after making a due allowance for the difference in the expense of loading or unloading the goods. Having ascertained what is a reasonable compensation for a conveyance of the goods, the carrier has no right to exact anything more. He has a right to charge less; and hence the mere fact of unequal charges being made on like

law to carry goods delivered for carriage upon being paid a reasonable compensation, nor does it deprive the legislature of the power by any future enactment or general law to regulate the rates of freight charged by the company. See *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 75; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 325; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418; *Kilmer v. New York Cent. & H. R. R. Co.*, 100 N. Y. 395.

¹ In *Holford v. Adams*, 2 Duer, 471, the contract relieved the express company from any liability not arising from fraud or gross negligence, and it was held that this stipulation was to be considered in fixing the amount that should be paid as freight.

² This point has been much discussed in England under the statute requiring uniform rates. *Crouch v. The Great Northern Railw.* 25 Eng. L. & Eq. 449. In this state a railroad corporation is not allowed to make an unreasonable or unjust discrimination between its customers in its freight charges, and the question as to whether such discrimination has been made is ordinarily one of fact. For the circumstances and conditions which may justify inequality in freight charges, see *Root v. Long Island R. R. Co.*, 114 N. Y. 300; *Concord & Portsmouth R. R. v. Forsaith*, 59 N. H. 122; *Atchison, etc., R. R. Co. v. Denver, etc., R. R. Co.*, 110 U. S. 667. A railroad company is not bound to carry large and small quantities of the same kinds of merchandise between the same points at the same price; *Concord & Portsmouth R. R. v. Forsaith*, 59 N. H. 122. But see *Kinsley v. Buffalo, N. Y. & P. R. R. Co.*, 37 Fed. Rep'r, 181.

³ *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393. In this case it was held not illegal to demand different rates of freight on different kinds of property.

freight, carried over the same route, does not prove a violation of legal duty.¹

There has been some recent legislation, in this country and in England, designed to ascertain what shall be allowed as a fair compensation for the conveyance of property on railroads; and these statutes fixing maximum rates of freight are valid within the State enacting them.² In England, some railways are by their charters expressly or impliedly limited to reasonable, equal and impartial rates;³ and are not allowed to demand or recover unequal rates of freight.⁴ Not being thus limited, or only limited to reasonable charges, the carrier is not considered obliged by the common law to charge equal rates to all his customers;⁵ indeed, the railway is in some cases expressly permitted to charge higher than the average rates on small parcels, not exceeding in weight five hundred pounds; and even where the company is required to establish its rates of freight at so much per mile, equally for all persons, they are not prohibited from demanding different rates on different classes of goods.⁶

It is quite evident that a line of railroads can carry freight a thousand miles at a less rate per mile than it can carry the same freight one hundred miles; since the cost of loading and unloading is the same in both cases. And though we eliminate this item of difference, by making a due allowance for it, experts in the business still claim that a line of roads may carry large quantities over long distances at lower rates per ton per mile than smaller quantities over shorter distances, and derive equal profits from the transportation; because there may be greater economy practiced in the use of labor, steam-power and rolling

¹ *Finnie v. Glasgow & Southwestern Railw.* 2 McQueen's H. of L. 177; 34 Eng. L. & Eq. 11; *Ransome v. Eastern Counties Railw.* 1 C. B. (N. S.) 437; S. C. 4 id. 135; 38 Eng. L. & Eq. 232; *Johnson v. Pensacola, etc., R. R. Co.*, 16 Fla. 623; *Ex parte Benson*, 18 S. C. 38; *Ragan v. Aiken*, 9 Lea (Farm.), 609.

² *Peik v. Chicago & Northwestern R. Co.*, 4 Otto, 164; *Lawrence v. Same*, 4 Otto, 164; *Chicago, Milwaukee & St. Paul R. Co. v. Ackley*, 4 Otto, 179; *Winona & St. Peter R. Co. v. Blake*, 4 Otto, 180; *Stone v. Wisconsin*, 4 Otto, 181; *Georgia R. R. & B. Co. v. Smith*, 128 U. S. 174. As to the extent and manner of exercising legislative regulation of railroads, see *Charlotte, etc., R. R. Co. v. Gibbes*, 142 U. S. 386.

³ *Boxendale v. London & Southwestern R. Co.*, 4 H. & C. 130; 35 L. J. Exch. 108; 1 L. R. Exch. 137; 12 Jur. N. S. 274; *Parker v. Great Western R. Co.*, 7 M. & G. 253; 7 Scott N. R. 835; 8 Jur. 194; *Branley v. South Eastern R. Co.*, 12 C. B. (N. S.) 63; 9 Jur. N. S. 329; 31 L. J. C. P. 286; 6 L. T. N. S. 458.

⁴ *Pickford v. Grand Junction R. Co.*, 19 M. & W. 399.

⁵ *Boxendale v. Eastern Counties R. Co.*, 4 C. B. (N. S.) 63; 21 L. J. C. P. 137. To the same effect see *Johnson v. Pensacola, etc., R. R. Co.*, 16 Fla. 623; *Ex parte Benson*, 18 S. C. 38.

⁶ *Parker v. Great Western R. Co.*, 6 El. and Black. 77; 2 Sur. N. S. 325.

stock on the long routes.¹ A settlement of this question of fact must naturally precede a statute establishing freights at so much a mile, with merely an allowance for the difference in the expense of handling the goods.²

§ 520. Railway and canal companies are in England required by statute to afford all reasonable facilities for receiving and forwarding and delivering goods and chattels, without making or giving any unreasonable preference or advantage to or in favor of any person or company, or any kind of traffic; and without subjecting any person or company or traffic to any prejudice or disadvantage. For any conduct in contravention of the statute, the injured party may have an injunction restraining the company from any further violation of the act.³ It is a violation of the statute for a railway to carry for one person or company the same class of merchandise at lower rates than they charge other persons;⁴ it is a discrimination not permitted by the statute, unless there be circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter;⁵ or unless the goods be differently packed or done up in parcels so as to occasion, in one case more and in the other less, labor and trouble in handling them.⁶ The carrier must deal fairly, he must give the same advantages and facilities to all parties; and he must not establish rates or conduct his business in such a manner as to make it operate unequally or oppressively towards individuals or towards a particular class of his customers.⁷ The intent of the statute is to give to all persons, in their dealings with a railway carrier, a perfect equality of rights and privileges.

Independent of the statute the carrier is bound to receive and carry the goods of all persons, indifferently, on the same terms, namely, for a reasonable compensation; and the rule does not leave him the room or

¹ *Ransome v. Eastern Counties R.*, 28 Eng. L. & Eq. 232; S. C. 31 Law Times, 72; the proposition is assumed in *Nicholson v. Great Western R. Co.*, 4 C. B. N. S. 366; 4 Jur. N. S. 1187; 28 L. J. C. P. 89. See *Root v. Long Island R. R. Co.*, 114 N. Y. 399.

² *Shipper v. Penn. R. Co.*, 47 Pa. St. R. 339.

³ 17 and 18 Vict. C. 31.

⁴ *Harrison v. Cocker mouth & W. R. Co.* 3 C. B. N. S. 693; 4 Jur. N. S. 1279; 27 L. J. C. P. 169.

⁵ *Oxlade v. North Eastern R. Co.* 1 C. B. N. S. 454; 3 Jur. N. S. 637.

⁶ *Boxendale v. Eastern Counties R. Co.*, 4 C. B. N. S. 63.

⁷ *Boxendale v. Great Western R. Co.*, 4 Jur. N. S. 1241; 5 C. B. N. S. 309; *Boxendale v. Great Western R. Co.*, 5 C. B. N. S. 336; 28 L. J. C. P. 81; 4 Jur. N. S. 1279; *Garton v. Great Western R. Co.*, 5 C. B. N. S. 669; 5 Jur. N. S. 685; 28 L. J. C. P. 158.

the liberty to give one person or one company a preference over others.¹ His refusal to receive and carry to or for an individual or a company, without giving some legal excuse, renders him liable in an action for damages—liable to the party tendering the goods, where they are consigned to a factor or commission merchant for sale.² The party tendering the goods for conveyance should offer to pay a reasonable compensation, specifying a definite sum; he need not make a technical tender of the money.

The carrier has a right to know the nature of a package tendered to him for carriage, since a knowledge of its value must naturally dictate the care to be taken of it and the price to be paid for its transportation; and yet he cannot refuse to receive the package on the ground that the owner declines to disclose its contents.³

§ 521. The law does not permit a common carrier to constrain a customer into an agreement to pay unreasonable rates or freight, under peril of having his goods refused. It justifies the customer in paying the amount demanded, under protest, and allows him afterward to recover back the amount so paid exceeding the carrier's reasonable charges.⁴ On the same principle it allows the owner or consignee, at the place of destination, to pay the amount of freight demanded, under protest, and recover back the excess above the amount justly due.⁵ Moneys paid under a duress of goods, in order to obtain possession of them and prevent serious losses, may be recovered back; and this species of duress

¹ *New England Ex. Co. v. Maine Central R. R. Co.*, 57 Maine, 188. See *Audenried v. Phila. & Reading R. Co.*, 68 Penn. St. 370, and *Messenger v. Penn. R. R. Co.*, 7 Vroom, 407; *S. C. 37 N. J. Law*, 531; 36 *N. J. Law*, 407; *McDuffee v. Portland & Rochester R. R.*, 52 *N. H.* 430; *Atwater v. Del., Lack. & West. R. R. Co.*, 4 *East. Rep'r*, 186.

² *Lafarge v. Harris*, 13 *La. Ann.* 553. See the form of the complaint or declaration which was held sufficient in *Pickford v. Grand Junction R.*, 8 *M. & W.* 372.

³ *Crouch v. London R.*, 14 *C. B.* 255; 25 *Eng. L. & Eq.* 287.

⁴ *Parker v. Bristol & Exeter R. Co.*, 6 *Railw. Cas.* 776; *Garton v. B. & E. R. Co.*, 1 *El. B. & S.* 112; *Peters v. Railroad Co.*, 42 *Ohio St.* 275; *Lafayette & Indianapolis R. R. Co. v. Pattison*, 41 *Ind.* 312; *Mobile & Montgomery Ry. Co. v. Steiner*, 61 *Ala.* 559. But where freight has been carried for a long course of years at schedule price, the shipper making no objection to the reasonableness of the charge, he will be deemed to have assented to the charge as reasonable and to have waived any objection thereto, at least so far as to preclude him from recovering back any portion of the freight so paid. *Kilmer v. New York Cent. & H. R. R. Co.*, 100 *N. Y.* 395. The statute authorizes the board of railroad commissioners to take somewhat indefinite jurisdiction and remedial procedure in case of unjust discrimination in charges by railroads. *Laws of 1890*, Ch. 565, § 160.

⁵ *Ashmole v. Wainwright*, 2 *Q. B.* 837; 2 *G. & D.* 217; 6 *Jur.* 729; *Harmony v. Bingham*, 12 *N. Y.* 99, 109.

is not a whit more oppressive than an unreasonable demand of freight, made when the goods are first tendered to the carrier for transportation.

§ 522. The carrier is not bound to depart from his usual mode of receiving goods; he has a right to prescribe the manner and the time of receiving them, treating all customers alike.¹ He is not obliged to accept goods of an explosive or dangerous character;² or goods which are threatened with destruction by the violence of a mob or by a present and imminent danger from a fire.³ Having room and the means of carrying the goods, as the rule is usually stated, he is obliged to receive them, and not otherwise—a reasonable qualification of the rule when we consider the usages or modes of business accompanying the establishment of the rule itself.⁴ A railway carrier, being obliged affirmatively to prepare for and provide the means of transportation, is clearly bound to anticipate the usual and ordinary demands of business, and by a proper distribution of its rolling stock at the different stations along the road, fulfill its duty to send forward the goods delivered to it without any unreasonable delay.⁵ And it is plain that a railroad company cannot excuse a refusal to receive goods, by alleging its own antecedent neglect to provide the means of sending them forward.⁶

§ 523. III. DELIVERY TO THE CARRIER.

In order to charge the carrier with goods, there must be a delivery of them into his custody; a delivery to the carrier personally, to his agent or servant, or to some one acting in his behalf and authorized to receive them.⁷ It is not enough that the property be delivered upon the carrier's premises, in the place appointed by him for receiving

¹ *Garton v. Bristol and Exeter R. Co.*, 5 C. B. N. S. 669; 5 Jur. N. S. 685; 28 L. J. C. P. 158.

² See post, § 531.

³ *Pittsburg, Cincinnati, etc., Ry. Co. v. Hollowell*, 65 Ind. 188; *Edwards v. Sherratt*, 1 East, 604; boatmen prevailed on to stop and receive a cargo of corn threatened, and afterwards destroyed by a mob. See situation presented in *Miller v. Steam Nav. Co.*, 10 N. Y. 431; S. C. 13 Barb. 361. In *Pittsburg, Fort Wayne & C. R. R. Co. v. Hazen*, 84 Ill. 36; in *Giesner v. Lake Shore & M. S. Ry. Co.*, 102 N. Y. 536; and in *Gulf, C. & S. F. R. R. Co. v. Levi*, 76 Texas, 337.

⁴ *Jackson v. Rogers*, 2 Show. R. 327; *Lovett v. Hobbs*, id. 127; *Batson v. Donovan*, 4 Barn. & Ald. 32.

⁵ *Ballentine v. Western Mo. Railw.* 40 Mo. 491. The road is not bound to provide against an unusual and extraordinary pressure to send forward grain or merchandise. *Wibert v. N. Y. & Erie R. Co.*, 12 N. Y. 245; *Galena and Chicago Union R. R. Co. v. Rae*, 18 Ill. 488.

⁶ *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500.

⁷ *Selway v. Holloway*, 1 Ld. Raym. 46.

goods; it must be accepted and received,¹ or left with notice in the usual manner.²

The circumstances are to be considered in determining what amounts to a delivery. Parcels of light weight are delivered in the manner suggested by the nature of the property; and the same is true of heavy and cumbersome articles.³ The delivery of a money package to an express company should be made at the office, to an agent authorized, or at least accustomed to receive such packages.⁴ The manner of the delivery is not so important when the goods are received by the carrier's agent to receive; it becomes more important when the goods are left at the proper place, with persons who are not directly authorized and yet are permitted by the carrier to receive them.⁵

§ 524. The mode or custom of delivering goods to a ship carrier, in large quantities, goes far to insure a legal delivery. *E. g.*, the goods are carried to the vessel by a carman in successive loads and delivered to the master or his agent on board, who gives a receipt for each parcel when received; and these receipts are afterwards returned to the master, when he delivers the bill of lading to the shipper.⁶ The same custom prevails in our larger towns when goods are delivered to a railroad carrier, or to one of our express companies: a receipt is taken for the package or parcel or box of goods.⁷ On a sale of goods, where the purchaser directs them to be sent to him by a specified carrier, the seller making a delivery should take a receipt for them, or have them booked where that is usual; he should deliver them in such a manner as to charge the car-

¹ *Grosvenor v. The N. Y. C. R. R. Co.*, 39 N. Y. 34; *Blanchard v. Isaacs*, 3 Barb. 388; *Nelson v. Hudson River R. R. Co.*, 48 N. Y. 498.

² *Packard v. Getman*, 6 Cowen, 757; *Merriam v. Hartford & N. H. Railw.*, 20 Conn. 354. A carrier is responsible as such only where goods are delivered to and accepted by him for immediate transportation in the usual course of business. If delivered awaiting further orders from the shipper before carriage, he is liable only as a warehouseman. *O'Neill v. New York Cent. & H. R. R. Co.*, 60 N. Y. 138; *Rogers v. Wheeler*, 52 N. Y. 202. Delivery to a carrier for transportation involves exclusive possession in the carrier, and a surrender of custody and control for the time being by the shipper. *Wilson v. Atlantic, etc., R. R. Co.*, 82 Ga. 386.

³ *Slade v. Hudson River R. R. Co.*, 16 Barb. 383; carpenter's tools left at freight depot without notice. See *Merritt v. Old Colony and Newport R. Co.*, 11 Allen, 80, relating to the delivery of an engine.

⁴ *Cronkite v. Wells*, 32 N. Y. 247.

⁵ *Burrell v. North, 2 C. and Kirwan*, 680; *Langworthy v. N. Y. and Harlem R. R. Co.*, 2 E. D. Smith, 195; 32 N. Y. 247; 12 M. and W. 766.

⁶ *Brower v. Peabody*, 13 N. Y. 121. The facts presented in this case show the custom or mode of business in New York; see *Whitlock v. Hay*, 58 N. Y. 284, as to the use of receipts for grain on storage.

⁷ *McCotter v. Hooker*, 8 N. Y. 497.

rier; otherwise the title will not pass on the delivery;¹ he should make such a delivery to the carrier as will give the purchaser a remedy against him for his failure to carry safely and deliver the goods at the place of destination.²

§ 525. It is competent for a carrier to adopt a practice or usage of receiving goods at a station or at a wharf without special notice; and where he does so and by his conduct induces his customers to understand that he will consider a deposit of goods in his freight house or on his wharf or platform as a delivery of them, the deposit must have effect according to the understanding thus established.³ We give effect to a similar usage when it operates in his favor, at the end of his transportation of the goods, and there is no reason why it should not be held valid when it operates against him;⁴ valid from the time when according to the regular routine of business the goods would come into his custody. On the same ground the carrier must be held chargeable with goods when they are delivered at the place appointed by him, or placed in a car under his control with his assent, or when sent to a particular office under his instructions,⁴ or in pursuance of an established usage.⁵

§ 526. The goods or package must be delivered to the carrier, to be carried by him; otherwise he cannot be charged as a carrier. If a passenger on board deliver a sealed letter containing bank notes to the clerk of a steamboat for safe keeping, the contract is one of deposit between *them*, and the depositary is only responsible for ordinary care.⁶ The goods must also be placed in the custody of the carrier; in order to charge him, he must be entrusted with the goods; for where the owner sends a guardian with them, or where the goods are placed in the carrier's conveyance under a contract that the owner shall go along with them and take care of them, the carrier is not answerable as such for their safety.⁷ He is not answerable for a watch or for money or for parcels or for wearing apparel which a passenger retains in his own custody.⁸ But where the carrier actually assumes custody of goods, he

¹ *People v. Haynes*, 14 Wend. 546; *Cross v. O'Donnell*, 44 N. Y. 661.

² *Clark v. Hutchins*, 14 East, 475; *Buckman v. Levi*, 3 Campb. 414.

³ *Merriam v. Hartford & N. H. R. Co.*, 20 Conn. 350, directly in point; and the *J. Russell Manuf. Co. v. N. H. Steamboat Co.*, 52 N. Y. 657, indirectly; *S. C.* 50 N. Y. 121.

⁴ *Colepepper v. Good*, 5 Carr. and Payne R. 380; *Illinois, etc., R. R. Co. v. Smyser*, 38 Ill. 354.

⁵ *Sims v. Chaplin*, 5 Adolph. & Ellis, 634.

⁶ *Wilcox and Fearn v. Steamboat Phila.*, 9 Louis R. 80.

⁷ *East India Co. v. Pullen*, 1 Strange, 690; *Brinde v. Dale*, 8 Carr. and Payne, 217.

⁸ *Tower v. Utica and S. R. Co.*, 7 Hill (N. Y.), 47; *Miles v. Cottle*, 6 Bing. 743;

is answerable for them notwithstanding the owner accompanies them or sends a servant to keep an eye on them;¹ for the same reason that an innkeeper is liable, though the owner with his consent takes his goods with him into his own room.

§ 527. The delivery to a carrier is generally a matter of fact to be established by evidence. Proof that goods and merchandise were delivered according to the usage on the wharf, to the mate of the ship by which they were to be carried, is sufficient to charge the carrier. The act of loading a vessel is a part of the carrier's duty, and where the usage is for him to receive and receipt the goods on the quay or wharf, he is responsible for them from the time he receipts them. The delivery to the authorized agent is a delivery to the carrier, and after that he must answer for them though they are lost from the wharf before they are shipped.² Having accepted goods or chattels, the carrier cannot afterwards set it up as a defense, that he was not bound to receive them at the time, or at the place, or in the condition in which they were offered; as where the carrier received a greyhound, not properly secured;³ or where he received a package at the post-office where his coach was standing;⁴ or where he received goods after the time prescribed, to go forward on the same evening, and yet in season so that they could be sent forward.⁵

§ 528. The carrier's liability attaches from the time he receives goods for carriage. Receiving them on Thursday, his conveyance leaving on Saturday, he is liable for a loss of the goods by fire, occurring between the two days.⁶ His responsibility begins from the delivery to him, where the goods are to be carried forward without further orders.⁷ The

Whalley v. Wray, 3 Esp. 74; Gibbon v. Poynton, 4 Burr. 2297; Abbott v. Bradstreet, 55 Maine, 530; money stolen from a passenger's pocket; Phelps v. London and N. W. R. Co., 19 C. B. (N. S.) 321; Clark v. Burns, 118 Mass. 275; Weeks v. N. Y., N. H. & H. R. R. Co., 9 Hun, 669. A carrier does not undertake to carry and safely deliver money carried in the passenger's clothing during the day and placed under his pillow in the sleeping-car at night. Lewis v. N. Y. Sleeping Car Co., 143 Mass. 267; Carpenter v. N. Y., N. H. & H. R. R. Co., 124 N. Y. 53.

¹ Robinson v. Dunmore, 2 Bos. and Pull. 417.

² Cobban v. Donne, 5 Esp. R. 41; Fraganno v. Long, 4 Barn. & Cres. 219; Anjore v. Deagle, 3 Har. & John. R. 206; Fitchburg Railroad v. Hanna, 6 Gray, 539; Randleon v. Murray, 8 A. and E. 109.

³ Stuart v. Crowley, 2 Stark. R. 287.

⁴ Phillips v. Earle, 8 Pick. R. 182; Kreuder v. Woolcott, 1 Hilton, 223.

⁵ Pickford v. Grand Junction R. Co., 12 Mees. & W. 766; Hickox v. Naugatuck R. 31 Conn. 281.

⁶ Forward v. Pittard, 1 Term R. 27; Cobban v. Donne, 5 Esp. 41.

⁷ Hyde v. Trent & Mersey Nav. Co., 5 Term R. 389; Blossom v. Griffin, 3 Kernan (13 N. Y.), 569, 576; Coyle v. Western R. Corporation, 47 Barb. 152, 154; Ladue v. Griffith, 25 N. Y. 364; Grand Tower, etc., Co. v. Ullman, 89 Ill. 244.

rule is the same where he keeps an inn or a warehouse, and receives goods into them for conveyance over his line as a carrier; and where he receives goods into his warehouse from another carrier, addressed to a point beyond the termination of his line.¹ He is liable as a carrier unless he receives the goods into his warehouse or elevator, as the case may be, to await further orders.² Receiving goods into his custody for storage until he is ordered to send them forward, he is not answerable as a carrier until his duty as a carrier begins.³ Having carried the goods to the end of his route, he becomes a forwarder of such goods as have a more distant destination; as where a carrier on the Hudson river receives goods at New York to be transported to Troy, from whence they are to go north by the canal to Granville; at Troy his duty as a carrier ceases on his delivery of the goods to the next carrier, pursuant to his instructions.⁴

§ 529. The delivery to the carrier must be honestly made. He must be fairly entrusted with the property. For illustration: a passenger came on board the steamboat *Constellation* at New York, delivering to the master of the boat a trunk as his baggage, in which was deposited over eleven thousand dollars in bank notes; the passenger spoke of it to the master as a trunk of importance, without mentioning what was in it, or paying anything for its carriage separate from his fare to Newburgh. The bills were received by the passenger from the president of the Bank of America, in seven sealed packages, with advice that he had better deliver them to the captain immediately on going aboard, which he considered as a direction to him, and placed the trunk in the office of the boat behind the door, as directed by a young man in it, who appeared to be doing business there; then went ashore a few minutes to buy some oranges, when on his return the trunk had disappeared; and the plaintiff, the Orange County Bank, the owner of the money, brought an action against the proprietors of the boat, seeking to charge them as common carriers; and it was held that this was not such a delivery of the packages of the bills as to render the carrier responsible

¹ *Rogers v. Wheeler*, 6 Lans. 420; 52 N. Y. 262.

² *Barren v. Eldridge*, 100 Mass. 455. Ante, §§ 335, 336.

³ *White v. Humphrey*, 11 Adolph. & Ellis R. 43; *Blossom v. Griffin*, 13 N. Y. 569; *O'Neil v. N. Y. Cent. & H. R. R. Co.*, 60 N. Y. 138; *Rogers v. Wheeler*, 52 N. Y. 262.

⁴ *Ackley v. Kellogg*, 8 Cowen, 223; *Root v. Great Western R. R. Co.*, 45 N. Y. 524; *Goold v. Chapin*, 20 N. Y. 259; *St. Louis Ins. Co. v. St. Louis R. R. Co.*, 104 U. S. 146; *Mich. Cent. R. R. Co. v. Myrick*, 107 U. S. 102; *Hunter v. Southern P. R. R. Co.*, 76 Texas, 195; *Crouch v. Louisville & N. R. R. Co.*, 42 Mo. App. 248; *Piedmont Manuf. Co. v. Columbia & Greenville R. R. Co.*, 19 S. C. 358; *Knight v. Providence & Worcester R. R. Co.*, 13 R. I. 572.

for them, on the ground that when a carrier is to be made liable for bank bills, not made up in a package pointing to its contents, common justice requires that he should be informed of the nature of his charge, so that he may take the necessary precautions for its safety and for his own protection.¹

Under this rule the carrier is not held liable for money packed and silently delivered with baggage, exceeding the amount required to meet reasonable traveling expenses.¹ It is a breach of good faith to conceal in one's goods or baggage large quantities of money carried merely for transportation, where the owner's intention is to charge the carrier with its safe conveyance ; and though there be no fraudulent intent in the concealment, it is an act of carelessness ; it tends to throw the carrier off his guard, and it prevents him from taking that degree of care of the property which a knowledge of its value would insure.²

§ 530. In delivering goods to a carrier, it is to be assumed that they are of a kind and value indicated by the manner in which they are packed or done up ; and where they are disguised in packages, making them to appear of less value than they really are, and the carrier is thus induced to treat them as of little value, he is not chargeable with the goods.³ He is not chargeable with silks and furs, packed and delivered in bedding and carried at a lower rate.⁴ He does not make any contract covering the goods thus withdrawn from his observation ; and he does not, where a passenger packs merchandise in his baggage, and the same is carried as baggage, the carrier having no knowledge of its existence until the event brings it to his notice.⁵ In England, as we shall see, the

¹ *Orange Co. Bank v. Brown*, 9 Wend. 85; *Merrill v. Grinnell*, 30 N. Y. 594, 621; *Dexter v. Syracuse, B. & N. Y. R. R. Co.*, 42 N. Y. 326; *Whitmore v. Steamboat Caroline*, 20 Mo. 513; *Dunlap v. International Steamboat Co.*, 98 Mass. 376; *Johnson v. Stone*, 11 Humph. 419; *Doyle v. Kisor*, 6 Ind. 242.

² *Chicago & Aurora R. R. Co. v. Thompson*, 19 Ill. 578, the claim was to recover \$750 alleged to have been in a box of goods that was lost. As to sums of money packed with baggage and unnecessarily large for traveling expenses, see *Davis v. Michigan C. Railroad*, 22 Ill. 278; *Hickox v. Naugatuck Railroad*, 31 Conn. 281; as to sums allowed, see *Merrill v. Grinnell*, 30 N. Y. 594; *Jordan v. Fall River R. Co.*, 5 Cush. 69. The amount which is reasonable, considering the journey and the circumstances, may be recovered. *Carpenter v. N. Y., N. H. & H. R. R. Co.*, 124 N. Y. 53; *Fairfax v. N. Y. Cent. & H. R. R. Co.*, 73 N. Y. 167.

³ *Warner v. Western Transp. Co.*, 5 Robt. 490, 495.

⁴ *Chicago & Alton R. Co. v. Shea*, 66 Ill. 471; *Savannah F. & W. R. R. Co. v. Collins*, 77 Ga. 376.

⁵ *Cahill v. London & N. W. R. Co.*, 13 C. B. N. S. 818; *Belfast & B. R. Co. v. Keyes*, 9 H. L. Cas. 556; *Haines v. Chicago, etc., R. R.*, 29 Minn. 160; *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598; *Gurney v. Grand Trunk R. R. Co.*, 37

carrier is by statute exempted from liability for loss or injury by his servant's negligence to any of the specified articles, delivered to him for carriage and being above the value of ten pounds, unless its value is declared and an increased charge paid thereon.¹ The intent of the statute is to excuse the carrier for losses arising through the negligence of his servants, in respect to articles of great value in small compass, when delivered without any statement of their value.² And the statute takes effect without any proof showing fraud or bad faith on the part of the owner of the package or parcel.³ Independent of the statute the carrier is relieved from liability only where the owner practices some fraud or concealment inducing him to accept the goods as being of less value than they are, or where the owner by his negligence induces him to omit taking proper care of them.⁴

§ 531. *Dangerous Goods.* It is the duty of the owner, delivering dangerous goods or explosive compounds for transportation, to give the carrier notice of the dangerous nature of the article or package; and he is liable for the omission, where the article is delivered by his agent.⁵ Such goods require more caution in their conveyance than ordinary merchandise, and as they cannot be safely carried without using ex-

State Rep'r, 155; Metz v. California S. R. Co., 85 Cal. 329; Blumantle v. Fitchburg R. R. Co., 127 Mass. 322. To the extent that articles carried by a passenger for his personal use while traveling exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier by general law is responsible as insurer. New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24.

¹ 11 Geo. IV., and 1 Will. IV., Ch. 68, amended by 28 and 29 Vict. Ch. 94, cited as The Carrier's Act, Amendment Act, 1865.

² Pianciani v. London & Southw. Co., 18 C. B. 226; Hearn v. London & Southw. Co., 10 Exch. 793; 3 C. L. R. 597; Hollister v. Nowlen, 19 Wend. 234, 249.

³ Boys v. Pink, 8 Car. and P. 361.

⁴ Gorham Manuf. Co. v. Fargo, 3 Jones and Spencer (35 N. Y. Superior Ct. R.), 434. In this case a box of coin weighing about twenty pounds, eight inches long by five or six inches high and wide, wrapped in brown paper and sealed, was delivered to an express company, nothing being said to mislead. See 46 N. Y. 266; 3 E. D. Smith, 571; Southern Ex. Co. v. Everett, 57 Ga. 688.

⁵ Barney v. Burstenbinder, 7 Lansing, 210; 64 Barb. 212; Jeffrey v. Bigelow, 13 Wend. 518; Pierce v. Windsor, 2 Sprague, 35; Thomas v. Winchester, 6 N. Y. 397. In this State it is provided by statute that "any person who shall knowingly present, attempt to present, or cause to be presented or offered for shipment to any railroad, steamboat, steamship, express or other company engaged as common carrier of passengers or freight, dynamite, nitro-glycerine, powder or other explosives, dangerous to life or limb, without revealing the true nature of said explosive or substance so offered or attempted to be offered to the company or carrier to which it shall be presented, shall be guilty of a felony, and upon conviction shall be fined in any sum not

treme care, the owner is bound in law to give the carrier notice of their dangerous character. Being notified of their dangerous nature, the carrier may either refuse to take the goods, or receive them and make suitable provisions against the danger.¹ The judges were at first inclined to place the shipper's liability on the ground of an implied contract, that he would not deliver, to be carried on the trip, packages of a dangerous nature without giving notice of the fact; in other and later cases the liability is placed on the ground of duty, without appealing to the theory of contract. The article being dangerous and packed in such a manner as not to be distinguishable from harmless packages, the owner is bound to guard it and handle it as a dangerous agent; and where the article is new and dangerous, it is incumbent upon him to warn the carrier to whom it is delivered, and all persons concerned in handling it, against the danger.² Failing in this duty, he is liable to the carrier and to the carrier's servant for any injury resulting from his handling it without warning;³ and to any person injured, however remote from the place where it was delivered, in consequence of handling it in ignorance of its true nature.⁴

The party delivering the goods, being ignorant of their dangerous nature, is not liable;⁵ and the carrier is not, where he receives them without knowledge, as ordinary goods, and under circumstances free from suspicion.⁶

IV. RESPONSIBILITY OF CARRIERS.

§ 532. By the general custom, or as it is termed in England the custom of the realm, which is the foundation of the common law on the subject, the common carrier entrusted with goods for carriage, is with two exceptions responsible for all losses. His responsibility is established with a view to public policy, to the reward which he receives, to

exceeding one thousand dollars, or imprisoned in a state prison for not less than one or more than five years, or be subject to both such fine and imprisonment. Penal Code, § 389.

¹ *Bross v. Maitland*, 6 Ellis and Black. 470; *Williams v. East I. Co.*, 3 East, 192; *Boston & A. R. R. v. Shanley*, 107 Mass. 568.

² *Boston & Albany Railroad v. Shanley*, *supra*; and *Barney v. Burstenbinder*, 64 Barb. 212; 7 Lansing, 210.

³ *Farrant v. Barnes*, 11 Com. Bench N. S. 553.

⁴ In *Barney v. Burstenbinder*, the nitro-glycerine was delivered in New York and carried to San Francisco, and there being handled in a warehouse, without knowing what it was, an explosion followed, doing damage to the plaintiff's property. See *Thomas v. Winchester*, *supra*.

⁵ *Hearne v. Garton*, 2 El. El. 66, decided under the English statute.

⁶ *Parrott v. Wells*, 15 Wallace, 524.

his character as an insurer, and to the terms of his contract, express or implied.¹

Under the rule applicable to other bailees for hire, the carrier would only be responsible for ordinary neglect; and it seems to have been held in the reign of Henry the Eighth that a common carrier was chargeable for a loss by robbery, only when he had traveled by dangerous ways or driven by night;² while in the more commercial reign of Elizabeth, it was resolved upon the same broad principle of policy and convenience, applicable to innholders, that if a common carrier be robbed of the goods delivered to him, he shall answer for the value of them. The rule was afterwards rendered still more stringent, until it became settled that the carrier must answer for all losses, not caused by the act of God or the king's enemies. These exceptions are in truth part of the rule itself.³

§ 533. The conceded severity of the common law, in prescribing the liability of a common carrier, has been often and long defended by the wisest and ablest judges.⁴ Chief-Justice BEST points out the general reason of public convenience by which it is maintained in recent times, in these words: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servants with them to the place of their destination. If they should be lost or injured by the gross negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only allowed to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened, when they had not; namely the act of God, and the king's enemies."⁵

¹ *Coggs v. Bernard*, 2 Ld. Raym. 919; *Dale v. Hall*, 1 Wils. R. 181; *Jeremy on Law of Carriers*, 31-38; *Packard v. Taylor*, 35 Ark. 402; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; ante, § 462.

² *Noyes' Maxims*, Ch. 43.

³ *Mors v. Slue*, 1 Raym. 220; 1 Vent. 190, 238; *Colt v. M'Meehan*, 6 John. R. 160; *Elliot v. Russell*, 10 John. R. 1; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *The Maggie Hammond*, 9 Wall. 435; *Kohannan v. Hammond*, 42 Cal. 227.

⁴ Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 909, considers it a politic establishment, contrived by the policy of the law for the general safety.

⁵ *Riley v. Horne*, 5 Bing. 217. As will be noticed hereafter, the carrier does not

§ 534. The Code of Louisiana, adopting the rule of the civil law, holds the common carrier to the same liability as it does an innkeeper; that is to say, liable for goods stolen or damaged, by his servants or agents or by strangers; but not liable for goods stolen by force and arms, or by exterior breaking open of doors or by any other extraordinary violence. It holds him liable for the loss or damage of things entrusted to his care, unless he can prove that such loss or damage was occasioned by accidental and uncontrollable events.¹ It unites the rule of liability with a rule of evidence;² and it is noteworthy that the common law rule was "contrived by the policy of the law" to protect the owner against the difficulty of proving the cause of a loss, happening to his goods while in the hands of the carrier and his servants;³ and that this protection is rendered perfect by holding the carrier responsible for the goods, unless he proves a loss of them by causes for which he is not answerable.⁴

insure against loss or damage to goods arising from the conduct of the owner or from the nature and inherent character of the property carried. See *McGraw v. Baltimore & Ohio R. R. Co.*, 18 W. Va. 361; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *American Express Co. v. Smith*, 33 Ohio St. 511. See post §§ 597-599.

¹ Code of Louisiana, Arts. 2722-2726, and 2935-2940. See as to common law liability of innkeepers, ante, §§ 462, 463.

² *Hunt v. Morris*, 6 Martin, 673, 682. This action was for goods lost by fire while on board of the carrier's boat. "The law casts the burden of proof on the carrier. Where the loss or damage arises from occurrences entirely beyond the control of the carrier, such as an attack by the public enemy, a storm or tempest, it is enough for him to prove the fact, and he who claims compensation for the loss is to prove the fault or misconduct of the carrier, in order to recover against him. But in those cases which are not readily supposed to happen without negligence, such as a loss by robbery, fire, etc., the carrier is bound to show that they happened without any fault or negligence on his part, which, being a negative proposition, can only be established by evidence of the ordinary care and attention usually given by diligent men on like occasions. This rule gives to the owner, the plaintiff, the advantage of implied or presumptive evidence of negligence, on the part of the masters and owners, which they are bound to disprove by showing due diligence." And see *Heyle v. Inman Steamship Co.*, 14 Hun, 564.

Brousseau v. Ship Hudson, 11 La. Ann. R. 427, action for damages to bales of carpeting. The carrier must exculpate himself or bear the loss. The law presumes against a carrier in every case, except such as could not happen by the intervention of human means. He is liable for a loss or damage of goods, unless he shows that the same was occasioned by "accidental and uncontrollable events." The rule is not put disjunctively, so as to excuse him for a loss or damage occasioned by an accidental event.

³ *Roberts v. Turner*, 12 John. R. 232. "The carrier is held responsible as an insurer of the goods, to prevent combinations, chicanery and fraud.

⁴ *Alden v. Pearson*, 3 Gray, 432; *Heyle v. Inman Steamship Co.*, 14 Hun. 564; *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y. 564; *Read v. Spaulding*, 30 N. Y. 630; *Reid v. St. Louis, etc., R. R. Co.*, 60 Mo. 199.

§ 535. There does not appear to be any tendency in our modern decisions to relax the rule of liability imposed upon the carrier by the common law.¹ The rule carries with it a compensation; in the words of Chief-Justice BRONSON:² "There is less of hardship in the case of a carrier, than has sometimes been supposed; for while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if the courts were now at liberty to make instead of declaring the law, it may well be questioned whether they could devise a system which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact that in Great Britain, after the courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and in all its most important features restored the salutary rule of the common law."³

§ 536. Without departing from the great rule of liability asserted from an early day, it is quite true that the carrying business has been in recent years regulated, in some degree, in England by statute;⁴ and in this country by statute and the general use of special contracts. It may also be true that the progress of science tends to render the phrase, *act of God*, less descriptive of the causes of loss for which the carrier is not responsible, than it was in the seventeenth and eighteenth centuries, and that there is a silent drift of opinion working towards some modification of the rule itself. There is more study now of the civil law, in England and in this country, and on this subject apparently more respect paid than formerly to that system or body of laws;⁵ and

¹ *Cole v. Goodwin*, 10 Wend. 251; *Harrington v. McShane*, 2 Watts, 443; *Eagle v. White*, 6 Whar. 517; *Thomas v. Boston R. 10 Met.* 476; *Hale v. N. J. Steam Nav. Co.*, 15 Conn. 539; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *Spence v. Chadwick*, 10 Adolph. and El. (N. S.) 517; *Green v. Hern*, 2 Penn. 167; *Merritt v. Earle*, 29 N. Y. 115; *Hill Manuf. Co. v. Boston & Lowell R. R. Co.*, 104 Mass. 122.

² *Hollister v. Nowlen*, 19 Wend. 234, 241, A. D. 1838.

³ The discussion related to the carrier's claim to restrict his common law liability by a general notice. See 11 Geo. IV., and 1 Will. IV. Ch. 68; 48 N. Y. 212. See *Hale v. N. J. Steam Nav. Co.*, 15 Conn. 539; *Thomas v. Boston R. 10 Met.* 476; *Eagle v. White*, 6 Whart. 517.

⁴ 2 *Broom and Hadley's Comm.* 182-188, Waits' ed.

⁵ *Nugent v. Smith*, 34 L. T. Rep. (N. S.) 827; L. J. Rep. 697 C. L.; Law R., 1 C. P. D. 423.

yet scarcely so great a disposition to appropriate its principles as we find in the times of Lord Holt.

§ 537. *Act of God.* The law does not hold the common carrier liable for losses caused by the act of God or by the public enemy; and it includes among the acts of God, those events and accidents which proceed from natural causes and cannot be anticipated or guarded against or resisted; such as unexampled freshets, violent storms, lightning and frost. Having fulfilled his legal duty, *i. e.*, having guarded against the danger by the exercise of ordinary skill and prudence, the carrier is not answerable for a loss or injury arising from one of these agencies of nature.¹ He is not liable for a loss of goods caused by an unprecedented flood, where he has guarded against it by the use of such means as naturally suggest themselves to well-informed and competent business men.² And he is liable, where he fails to exercise at least ordinary forecast to provide against the danger, or fails to employ the proper means for overcoming it.³

The carrier is not liable for a loss of goods caused by a violent storm overtaking him at sea or upon one of our inland lakes and compelling him to throw them overboard. The necessity of the situation excuses the act, and the loss is considered one resulting from the act of God.⁴ The fact that he is obliged, as owner of the vessel, to bear his rateable

¹ *Nugent v. Smith*, *supra*; *Parsons v. Hardy*, 14 Wend. 215. The act of God interposing, excuses the performance of a contract; *Worth v. Edmonds*, 52 Barb. 40; it arrests performance; *Wolf v. Howes*, 20 N. Y. 197; *Parsons v. Hydar*, *supra*. As to what causes of loss will be attributed to the act of God, see *McGraw v. Baltimore & Ohio R. R. Co.*, 18 W. Va. 361; *Forward v. Pittard*, 1 Term R. 27; *McCall v. Brock*, 5 Strobb. 119; *Friend v. Wood*, 6 Gratt. 195; *Packard v. Taylor*, 35 Ark. 402; *Slater v. South Carolina R. R. Co.*, 29 S. C. 96; *Vail v. Pacific R. R.*, 63 Mo. 230; *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435.

² *Nashville and C. R. Co. v. David*, 6 Heiskell (Tenn.), 261; *Railroad Co. v. Reeves*, 10 Wallace, 191; *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106; *American Express Co. v. Smith*, 33 Ohio St. 511; *Norris v. Savannah, F. & W. R. R. Co.*, 23 Fla. 132; *Wallace v. Clayton*, 42 Ga. 443.

³ *Bowman v. Teall*, 23 Wend. 306; *ante*, §§ 344, 345. The carrier is not bound to exercise the highest degree of diligence to preserve the property from injury resulting from the act of God, but he is required to bestow such care as an ordinarily prudent person or carrier would bestow under like circumstances; and for a failure to exercise such care he will be liable. *Black v. Chicago, B. & Q. R. R. Co.*, 1 Neb. L. J. 30. "There is an *ex post facto* wisdom, which, after everything has been done without success, can suggest that something else should have been attempted; but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith and with judgment exercised under the best lights afforded." *American Express Co. v. Smith*, 33 Ohio St. 511, per WRIGHT, J.

⁴ *Price v. Hartshorn*, 44 Barb. 655; *S. C.* 44 N. Y. 94; *Gillett v. Ellis*, 11 Ill. 579.

proportion of the loss, is generally sufficient to insure the exercise of the highest skill and prudence on his part, before resorting to the extreme act of jettison; an act for which he is not answerable as a carrier, when it is justified by the exigency of the storm; and a loss towards which, the goods being duly shipped, all persons deriving a benefit from the sacrifice, must contribute *pro rata*;¹ as they must, where a loss is caused by fire while at sea, arising from a stroke of lightning.²

Winter closes the navigation of our canals, rivers and lakes each year, without any regularity in respect to the time of the interruption; the close can be anticipated, and the carrier can arrange his plans and make engagements in the confident expectation that the time will not vary more than fifteen, or at the most, twenty days, from one year to another. In making his contract towards the close of the season, the carrier has no advantage over his customer; and neither of them can foresee how early the ice will form so as to prevent the passage of boats.³ When it does form, arresting the voyage, or causing damage to the goods, it is such an intervention of superior force as will excuse delays and losses arising therefrom, without releasing him from the obligation of his contract. As soon as the obstruction ceases, he must resume the voyage and carry forward the goods; and in the mean time he must use all diligence to preserve the property.⁴

§ 538. The carrier is not responsible for delays or losses caused by heavy falls of snow, that hinder and delay the transportation of goods.⁵

¹ Gould v. Oliver, 4 Bing. 142; placed on deck with the owner's consent the owner assumes the risk of such a loss. See Barber v. Brace, 3 Conn. 9; Lawrence v. Min-turn, 17 How. U. S. 100; Johnston v. Crane, 1 Kerr, 356; Sayward v. Stevens, 3 Gray, 97; Mouse's Case, 12 Co. R. 63; Bancroft's Case, cited in Kenrick v. Eggleston, Ayley, 93; post, § 612. ² Nelson v. Belmont, 5 Duer, 310; S. C. 21 N. Y. 36.

³ Worth v. Edmonds, 52 Barb. 40.

⁴ Parsons v. Hardy, 14 Wend. 215; Bowman v. Teall, 23 Wend. 306. West v. Steamboat Berlin, 3 Iowa, 532. Goods were shipped late in the season at Dubuque for St. Paul, and it was held that the danger of a close of navigation by ice, entered into the contract. In Lowe v. Moss, 12 Ill. 477, the goods were shipped late in the fall at St. Louis for La Salle, on the steamboat Avalanche, and the boat was unable to reach La Salle in consequence of the ice, and the master stored the goods at Hennepin, from which the owner took part of them, the rest being injured by high water; held, that the carrier was justified in the delay arising from the obstruction, and was not released from the contract. Harris v. Rand. 4 N. H. 259, assumes the same principle.

⁵ Ballentine v. North, Mo. R. Co., 40 Mo. 491, holds that a snow storm so heavy as to delay the business on a railroad, is an act of superior force, which excuses the carrier so far as it hinders and delays the running of the cars. To the same effect see Pruitt v. Hannibal, etc., R. R. Co., 62 Mo. 527. Briddon v. Great Northern R. Co.,

Under his implied contract, he does not insure against injuries to fruits and vegetables by freezing, while in his hands; the action of frost being regarded by the law, in spite of its negative character, as one form of the superior force, or act of God. The owner can anticipate the danger from frost as well as the carrier, and he is understood to take the risk incident to the transportation from the weather, where the carrier is not chargeable with negligence.¹ Is it the carrier's duty to give fruits and vegetables, in his hand and exposed to danger from frost, a preference over other goods in sending them forward? He has the right to give them a preference, where he receives them at the same time with goods that are not thus perishable.² And he is liable for the damages where he unnecessarily delays the transportation late in the season, and thus by his negligence subjects them to the action of frost. He is bound to use greater diligence in loading and forwarding them on account of the special danger to which they are exposed.³ He is liable for the damages caused by his inexcusable delay, under a contract relieving him from liability for injuries resulting from the weather during the transportation.⁴

§ 539. A carrier cannot excuse himself by alleging a loss from inevitable accident, where he has brought the goods into the danger by a deviation from the established route, or from the route prescribed by the terms of his contract.⁵ A carrier receives goods on his vessel at New York to be carried to Norwich, Connecticut, and the usual route is through the Sound; the Sound being obstructed with ice, very late in the season, the carrier goes around on the south side of the island,

28 L. J. Exch. 51; 32 L. T. 94, holds that the carrier of goods and cattle is not bound to use extraordinary efforts or to incur extra expense to surmount obstructions caused by the act of God, such as a heavy fall of snow; 4 H. and N. 847.

¹ *Swetland v. Boston and Albany R. Co.*, 102 Mass. 276, 282. The carrier received at Albany, on the afternoon of December the seventh, a car-load of apples to be carried forward to Springfield, Mass., and being overtaken by a heavy snow-storm, left the car with a part of his train just east of Pittsfield over night, and the apples were frozen. See *Brig Collenburg*, and *Nelson v. Woodruff*, 1 Black. 156, 170; *Clark v. Barnwell*, 12 How. U. S. 272.

² *Marshall v. N. Y. Central R. Co.*, 45 Barb. 502; S. C. 48 N. Y. 660; *Tierney v. New York Cent. & Hudson R. R. Co.*, 76 N. Y. 305; *Peet v. Chicago, etc., Ry. Co.*, 20 Wis. 594.

³ *Wing v. The N. Y. and Erie R. R. Co.*, 1 Hilton, 235, 243; *Wolf v. American Ex. Co.*, 43 Mo. 421; *Hewett v. Chicago, Burlington, etc., Ry. Co.*, 63 Iowa, 611; *McGraw v. Baltimore & Ohio R. R. Co.*, 18 W. Va. 361; *Tierney v. New York Cent. & H. R. R. Co.*, 76 N. Y. 305.

⁴ *Place v. Union Express Co.*, 2 Hilton, 19, 26.

⁵ *Heyd v. Inman Steamship Co.*, 14 Hun, 564; *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y. 564; *Read v. Spaulding*, 30 N. Y. 630; *Reid v. St. Louis, etc., R. R. Co.*, 60 Mo. 199.

and while at sea is caught in a gale and compelled to throw the goods overboard; and this is held a deviation from the established route, rendering the carrier liable for the loss.¹ Here is another illustration: a carrier by a line of vessels receives goods on his ship at Philadelphia to be carried to Baltimore by the way of the Chesapeake and Delaware Canal, the dangers of the navigation excepted; and the canal being found out of order, so that he cannot pass through it, the carrier proceeds down the bay and out to sea, with the intention of going round to Baltimore; being caught in a gale at sea, his vessel strikes on a shoal, and is with the cargo totally lost; and the carrier is held liable for the loss of the goods.² The same rule has been applied in England: plaintiff put on board defendant's barge a quantity of lime to be conveyed from the Medway to London; the master of the barge deviated unnecessarily from the usual course, and during the deviation a storm arose and wet the lime, and the barge taking fire thereby, the whole was lost; and it was held that the defendant was liable, and that the cause of the loss was sufficiently proximate to entitle the plaintiff to recover under a declaration alleging the defendant's duty to carry the lime without any unnecessary deviation, and averring a loss in consequence of such deviation.³ The carrier is bound to go by the usual and ordinary route;⁴ and where he deviates therefrom and encounters an accident or a storm causing a loss, it does not lie with him to say, that he might have encountered the same or a different storm, with a like result, on the usual route.⁵

§ 540. Having incurred a liability by a breach of duty or by a breach of contract, the carrier cannot excuse himself or change his situation, by showing a subsequent loss of the goods by superior natural force. If he receive goods to forward by a particular steamer, and on its being withdrawn from the route sends them by another steamer without consulting the owner, he must bear the responsibility himself; he incurs the liability of an insurer, and cannot excuse himself by showing that the goods were lost in a subsequent wreck of the ship.⁶ If he receive

¹ Crosby v. Fitch, 12 Conn. 410. It is suggested that a usage to go by the other route, in cases of obstruction, would justify the carrier in adopting that course.

² Hand v. Baynes, 4 Wharton, 204.

³ Davis v. Garrett, 6 Bing. R. 716; Parker v. James, 4 Campb. 112; Hadley v. Clark, 8 Term R. 259. As to what constitutes a deviation see Hostetter v. Park, 137 U. S. 30.

⁴ Hales v. London & Northwestern R. Co. 4 Best and Smith, 66; Powers v. Davenport, 7 Blackf. 497.

⁵ Powers v. Mitchell, 3 Hill, 545. Where a bridge on the line of a railroad has been carried away by an extraordinary freshet, the carrier is not bound to seek another route. American Express Co. v. Smith, 38 Ohio St. 511.

⁶ Goodrich v. Thompson, 4 Robt. 75; S. C. 44 N. Y. 324.

goods to carry by rail, exempting himself from liability for losses by fire, he waives his exemption and renders himself liable as an insurer, when he assumes to carry the goods by water.¹ He renders himself liable for the consequences, when he departs from the terms of his contract prescribing the way or the mode of the conveyance.² He does the same thing, where he disregards the owner's instructions in carrying, or in sending forward the goods at the end of his line.³ He sends them at his own risk.

§ 541. The law relieves the carrier from liability for losses caused by superior force, when the same occur without rashness or negligence on his part; and it does not attribute losses to the act of God, when the carrier by his negligence or want of prudence and foresight, brings the goods in his custody under the operation of destructive natural forces; as where he carries the goods into a place of danger, or leaves them exposed to danger, and they are damaged by a freshet;⁴ or where he fills a steam-boiler with water, and negligently leaves it over night to the action of frost, causing a pipe to crack and leak, and thus injure the goods with water.⁵ The same rule has been applied where the carrier unreasonably detained the goods at a depot, and they were injured by an extraordinary freshet. His neglect was considered as concurring in and contributing to the injury; it delayed the goods and so exposed them to peril.⁶ On the other hand, in some of the cases in other states, a former delay on account of which the goods came, at a subsequent stage, in their transit, under the action of an extraordinary flood, at a point which they would have passed safely but for the delay, has not been regarded as a cause of the loss; on the ground that the law regards the proximate as the true cause of the loss and does not consider the remote cause.⁷ But these decisions are in direct conflict with the law as settled in this State.⁸

¹ *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514, 521. *Bostwick v. Baltimore & Ohio R. R. Co.*, 45 N. Y. 712.

² *Steel v. Flagg*, 5 Barn. & Ald. 342; *Danseth v. Wade*, 2 Scam. 285; *Hartung v. Pepper*, 11 Pick. 41.

³ *Johnson v. N. Y. Central R. R. Co.*, 31 Barb. 196; S. C. 33 N. Y. 610; *Ackley v. Kellogg*, 8 Cow. 223. See as to effect of the contract, 56 N. Y. 429; *Brown v. Mott*, 22 Ohio St. 149; *L. M. R. R. Co. v. Washburn*, 22 Ohio St. 324.

⁴ *Campbell v. Morse*, 1 Harper S. C. R. 468; *Wallace v. Vigus*, 4 Blackf. 260; *Boyle v. McLaughlin*, 4 Harris & John. R. 291; *Williams v. Grant*, 1 Conn. R. 487.

⁵ *Siordett v. Hall*, 4 Bing. R. 607.

⁶ *Read v. Spaulding*, 5 Bosw. 395; S. C. 30 N. Y. 630; *Michaels v. N. Y. Central R. Co.*, 30 N. Y. 564.

⁷ *Denny v. N. Y. Central R. Co.*, 13 Gray, 481; *Morrison v. Davis*, 20 Penn. St. 171; approved in *Railroad Co. v. Reeves*, 10 Wallace, 176.

⁸ *Condict v. Grand Trunk R. R. Co.*, 54 N. Y. 500, 505, 506.

A breach in the banks or locks of the canal, or the bad condition of the highway used by the carrier, or low water in the river on which the goods are to be conveyed, interrupting the navigation, will excuse a delay in the carriage of goods; but in the mean while the carrier is bound to keep the goods safely, and he is required to anticipate and provide against the usual and ordinary dangers by the way, such as freshets.¹ An unusual freshet interrupting the navigation on a canal, is not a legal excuse for a failure to fulfill an express contract to carry and deliver goods within a given time; especially where it is not shown that the transportation could not have been accomplished by any means.²

§ 542. A loss is not considered as arising by the act of God when any human agency concurs in producing it. The exception in favor of the carrier does not cover inevitable accidents which are in part caused by human agency; and it does not cover losses remotely caused by superior force; as where a ship and goods were lost through the combined agency of man and the natural current of a river changing the channel;³ or where a vessel was pierced and goods lost on the river, by the mast of a ship which was sunken in the channel by a storm two days before;⁴ or where a vessel was wrecked and goods lost by mistaking the lights on a stranded vessel for the lighthouse, and thus running on shore in a storm in the effort to enter the harbor;⁵ or where a severe storm produced a very low tide and thereby caused the carrier's barge to strike against a timber projecting from the lower part of the wharf.⁶ The carrier is liable, when his negligence mingles or combines with the act of God in causing the loss.⁷

The law does not excuse a loss by a carrier, when his vessel runs upon rocks or shoals that are well known to navigators; and it may be

¹ Wallace v. Vigus, 4 Blackf. R. 260; Boyle v. M'Laughlin, 4 Harris and John R. 291; Hand v. Baynes, 4 Whart. 204.

² Harmony v. Bingham, 12 N. Y. 99; Van Buskirk v. Roberts, 31 N. Y. 661, 675; Collier v. Swinney, 16 Mo. 484. See Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543, 551; Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Worth v. Edmonds, 52 Barb. 40, 44; Graves v. Berdan, 29 Barb. 100; Cobb v. Harmon, 29 Barb. 472, 476; Ward v. Hudson River Building Co., 125 N. Y. 230, 236; Stewart v. Stone, 127 N. Y. 500.

³ Smith v. Shepherd, Abb. on Shipp., Part 3, Ch. 4, § 1.

⁴ Merritt v. Earle, 31 Barb. 38; S. C. 29 N. Y. 115; Mynard v. Syracuse, etc., R. R. Co. 71 N. Y. 180, 187.

⁵ McArthur v. Sears, 21 Wend. 190.

⁶ New Brunswick Steamboat Co. v. Tiers, 4 Zab. (N. J.) 697.

⁷ Wolf v. Amer. Express Co., 43 Mo. 421; Dibble v. Seligson, 1 Woods, 406; Williams v. Grant, 1 Conn. 487; McGraw v. Baltimore & Ohio R. R. Co., 18 W. Va. 361; Gulf, C. & S. F. R. R. Co. v. McCorquodale, 71 Texas, 41.

questioned whether he can excuse himself from liability when he runs his vessel upon an unknown reef, not laid down on any chart.¹ The *vis inertiae* of a chain of rocks just covered by the water, can scarcely be termed an act of any kind. A newly formed obstruction in the channel, placed there by the current, may with much more propriety be termed an act of superior force, when the carrier's vessel strikes it without any failure in diligence or skill on his part.²

§ 543. A fire kindled by a stroke of lightning is considered an act of God; accidental fires, though wrought upon by a gale of wind and kindled into a great conflagration, are not so considered.³ The carrier insures against losses by an accidental fire, from the time he receives the goods as a carrier; ⁴ during the transit; and until he delivers them to the next carrier, or stores them when that becomes necessary;⁵ or carries them to the place of their destination and gives the consignee a reasonable opportunity to receive them.⁶ The ship carrier is equally liable under the common law; ⁷ as are also all inland carriers by land or by water.⁸ Even an exemption from losses by fire, will not excuse the carrier, where his delay exposes the goods to that danger.⁹

The statute of the United States regulating the transportation of passengers and merchandise, expressly exempts the owners of vessels (except canal-boats, barges, lighters and other craft used in rivers and inland navigation) from liability for any loss or damage to any merchandise shipped or taken on board, happening by reason or by means of any fire, unless the same is caused by the owner's neglect or design.¹⁰ The lives of the master and crew on board of a merchant vessel at sea,

¹ Williams v. Grant, 1 Conn. 487; Penneville v. Culles, 5 Harrington, 238; Friend v. Woods, 6 Gratt. 189.

² Smyrl v. Niolan, 2 Bailey, 421; Faulkner v. Wright, 1 Rice, 108.

³ Merchants' Dispatch Trans. Co. v. Kahn, 76 Illinois R. 520; Merchants' Dispatch Co. v. Smith, 76 Ill. 542; Chicago & N. W. R. R. Co. v. Sawyer, 69 Ill. 285; relating to the great Chicago fire; Shelton v. Merchants' Dispatch Trans. Co., 59 N. Y. 258; Lamb v. Camden & Amboy R. R. Co., 46 N. Y. 271, 286; Chamberlain v. Western Transp. Co., 44 N. Y. 305, 307; Miller v. Steam Nav. Co., 10 N. Y. 431.

⁴ Ante, §§ 523-531; Lakeman v. Grinnell, 5 Bosw. 625; Fenner v. Buffalo, etc., R. R. Co., 44 N. Y. 505.

⁵ Mills v. Michigan Central R. R. Co., 45 N. Y. 622; Miller v. Steam Nav. Co., 10 N. Y. 431; Gould v. Chapin, 20 N. Y. 259.

⁶ Burnell v. N. Y. Central R. R. Co., 45 N. Y. 184; 64 N. Y. 254.

⁷ Forward v. Pittard, 1 T. R. 27; Hyde v. Trent Nav. Co., 5 T. R. 389; Parker v. Flagg, 13 Maine, 181; Moore v. Michigan R., 3 Mich. 23.

⁸ Hale v. N. J. Steam Nav. Co., 15 Conn. 539; N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. U. S. 344; Swindler v. Hilliard, 2 Rich. 286; 10 N. Y. 431; 20 N. Y. 259; 46 N. Y. 271.

⁹ Condict v. Grand Trunk R. Co., 54 N. Y. 500.

¹⁰ R. S. of U. S. p. 832, § 4289; the statute covers baggage: Chamberlain v. Western Tr. Co., 44 N. Y. 305; Walker v. Transp. Co., 3 Wallace, 150.

are pledged for their diligence and good faith, and it is not thought necessary or just to hold the ship-owner liable as an insurer against losses by fire, in our coasting trade and foreign commerce, when the same occur without his fault; and the statute does not apply when the fire occurs by his neglect or design.¹ By its terms the act does not apply to any description of vessels used in rivers or inland navigation; and it has been adjudged that vessels running upon the Great Lakes or upon the Long Island Sound, are not to be considered as engaged in inland navigation, within the meaning of the statute.²

§ 544. The act of God which excuses a carrier, has been defined to be a direct and violent act of nature;³ and it has been adjudged that a sudden gust of wind, by which the hoy of a carrier shooting a bridge, is driven against a pier and upset by the violence of the shock, may be deemed the act of God;⁴ and that a sudden cessation of the wind may be so considered, when it leaves a sailing vessel beating up the river, on the point of changing her tack, and she in consequence of this instant loss of power runs ashore and sinks.⁵ "The sudden gust in the case of the hoyman, and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the act of God. He caused the gust to blow in the one case; and in the other the wind was stayed by Him." The decision has been criticised, and our courts have refused to excuse the carrier where the proximate cause of the loss of goods in his custody, was a sudden gust of wind diverting the course of a distant fire, so as to drive the flames upon them.⁶

§ 545. While the act of God, working the destruction of goods, will

¹ Knowlton v. Providence & N. Y. Steamship Co., 53 N. Y. 76; Norwich Co. v. Wright, 13 Wallace, 104-116; N. Y. Central R. R. Co. v. Lockwood, 17 Wal. 357; Hill Manuf. Co. v. Providence & N. Y. Steamship Co., 113 Mass. 495. Post, § 559.

² Moore v. Transp. Co., 24 How. U. S. 1; Knowlton v. Providence & N. Y. Steamship Co., 33 N. Y. Superior Ct. 370. The disastrous consequences of the loss of the Lexington, burned on Long Island Sound, prompted the enactment of the statute; and the Great Lakes are not more inland than the Mediterranean Sea. The jurisdiction of the State courts is not affected by the statute unless proper proceedings are taken by some party interested. Baird v. Daly, 57 N. Y. 236; Steamboat Co. v. Chase, 16 Wallace, 522. See Chamberlain v. Western Transp. Co., 44 N. Y. 305.

³ Friend v. Woods, 6 Gratt, 189. The definition is not perfect: a rail broken by force of frost is an act of God. McPadden v. New York Cent. R. R. Co., 44 N. Y. 478, 487. See Forward v. Pittard, 1 Term. R. 27; McCall v. Brock, 5 Strobb. 119; McGraw v. Baltimore & Ohio R. R. Co., 18 W. Va. 361; Chicago & N. W. Ry. Co. v. Sawyer, 69 Ill. 285.

⁴ Ames v. Stevens, 1 Strange, 128.

⁵ Colt v. McMechen, 6 John. R. 160; cited in Parsons v. Monteath, 13 Barb. 353; in *Homeser v. Nowlen*, 19 Wend. 234, 238; in *McArthur v. Sears*, 21 Wend. 190; in *Hulett v. Swift*, 42 Barb. 230, 250; and in *Price v. Hartshorne*, 44 Barb. 656, 666.

⁶ Miller v. Steam Nav. Co., 10 N. Y. 431.

excuse the carrier for their non-delivery, it does not leave him unharmed. If he accept goods to carry from one place to another, and on the way they are destroyed by a superior and irresistible force, he cannot recover a *pro rata* compensation for their carriage. The owner loses the goods and the carrier his freight.¹ Nothing is earned or due under the contract. But when the goods are not destroyed, and the voyage is interrupted by superior force, and the owner accepts the goods, the carrier is entitled to recover *pro rata* freight; and the rule is the same where the shipper abandons the cargo and the insurers accept the goods.² A forced acceptance of the goods by the owner at an intermediate port, does not imply a contract on his part to pay *pro rata* freight; on the other hand, it is the carrier's duty, and it is his right to send or repair and carry forward the goods, and so earn full freight.³

§ 546. We sometimes find it asserted in the decisions that the act of God, inevitable accidents, and dangers of the sea, are expressions of very similar legal import, excusing a loss, whether excepted in the bill of lading or not.⁴ But these terms do not convey the same sense; they cannot be sued interchangeably, the one phrase for the other. The perils or dangers of the sea arise in some instances from circumstances which cannot be attributed to the act of God, and are unquestionably covered by a policy of insurance against *the perils of the sea*; as where a loss arises from a collision, without fault on the part of either vessel;⁵ or where a loss arose from the sudden impressment of sailors sent on shore to fasten the ship.⁶ The policy covers losses directly attributable to the perils insured against, in spite of some want of diligence to escape them; and it does not cover a loss resulting from a collision caused by the negligence of the master and crew; *e. g.*, damages recovered by the owners of the injured vessel.⁷ The law regards the proximate as the

¹ Harris v. Rand., 4 N. H. R. 259; Osgood v. Groning, 2 Campb. 466; Luke v. Lynde, 2 Burr. 882; Palmer v. Lorillard, 16 John. R. 348; Ogden v. Barker, 18 John. R. 87; after tendering the goods to the consignee, the carrier not being in fault may recover freight, though the goods are afterwards destroyed by superior force. Clendaniel v. Tuckerman, 17 Barb. 184.

² Smyth v. Wright, 15 Barb. 51; Parsons v. Handy, 14 Wend. 215; McKibbin v. Peck, 39 N. Y. 262.

³ A. M. Ins. Co. v. Bird, 2 Bosw. 195; 5 Bosw. 474; Ellis v. Willard, 9 N. Y. 529.

⁴ Crosby v. Fitch, 12 Conn. 419; Williams v. Grant, 1 Conn. 487.

⁵ Whitesides v. Thurkill, 12 Sm. & Mar. 599; Plaisted v. Boston & Kennebec S. Nav. Co., 27 Maine, 132. See also Laurie v. Douglas, 15 Mees. & Wels. 746.

⁶ Hodgson v. Malcom, 5 Bos. & Pull. R. 336; per COWEN, J., in McArthur v. Sears, 21 Wend. 198, 199.

⁷ Mathews v. The Howard Ins. Co., 11 N. Y. 9; Gen. Mutual Ins. Co. v. Sherwood, 14 How. U. S. 351.

efficient or real cause of the loss under the policy. If the ship is driven against another by stress of weather, the injury she sustains is admitted to be direct, and the insurers are liable for it. But when the collision causes the insured ship to do some damage to the other vessel, both vessels being in fault, the rule in admiralty requires the damages done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. But when it turns out that the insured ship has done more damage than she has received, and is compelled in admiralty to pay the excess to the owners of the other ship, the law does not regard this loss as a proximate effect from the perils of the sea covered by the policy.¹ The policy is sometimes drawn so as to exclude any liability for losses or misfortunes arising from want of ordinary care and skill in the navigation of the ship.²

§ 547. *Public Enemy.* The carrier is expressly exempted from liability for losses caused by public enemies; as by a hostile invasion and seizure or destruction of property on the land, or by the capture of a carrier's vessel and cargo on the sea. The law does not hold the individual bound to defend goods against seizure or loss from superior and organized force;³ it excuses him where he uses due diligence to prevent the destruction or seizure, without success;⁴ and it measures the diligence demanded to escape or repel hostile force, by the nature of the trust and the dangers of the road.⁵

Rioters and land robbers are not classed as public enemies, under the rule; and pirates are thus classed, when they appear upon the sea armed with power sufficient to compel submission.⁶

In times of war the commissioned vessels of the enemy are authorized to capture private as well as public property, which is carried into port within the jurisdiction of the captors, proceeded against as prize of war, in the courts of admiralty, and condemned; this process is held to divest the original owners of their property, and is the most frequent mode in which individuals are made to suffer from the calamities of war. The mere act of seizing the property, does not, either on sea or land, work a change of the title; to accomplish the change, there must be a judgment of condemnation pronounced by a competent tribunal.⁷

¹ De Vaux v. Salvador, 4 Ad. & El. 420; 31 Eng. Com. Law. R. 104.

² Savage v. Corn. Ex. Fire & Inland Nav. Ins. Co., 4 Bosw. 1, 19; S. C. 36 N. Y. 655.

³ Blank v. Adams Ex. Co., 1 Duvall (Ky.), 232; a seizure by Confederate soldiers during the rebellion.

⁴ Holladay v. Kennard, 12 Wallace, 254.

⁵ It holds the carrier to the same diligence as he must use to escape the act of God. Railroad v. Reeves, 10 Wallace, 176.

⁶ Magellan Pirates, 25 Eng. Law & Eq. 595; Lewis v. Ludwick, 6 Cold. 368.

⁷ Page v. Lenox, 15 John. R. 172; Hudson v. Guestier, 4 Cranch, 293; 6 Cranch, 281; Cook v. Howard, 13 John. R. 276; Gross v. Withers, 2 Burr. 693.

But it is not necessary for the carrier to show a change of the title ; it is enough for him to show that the goods entrusted to him have been destroyed or wrested from him by the enemy of the state—those foreign enemies which are such by an open declaration or waging of war. Against all such organized forms of violence, it is the duty of the government to protect commerce, and shield its citizens from loss.¹

§ 548. *Reason and Ground of the General Rule.* With the two exceptions we have mentioned, the carrier receiving goods for transportation, must answer for them absolutely, unless he receives them upon a special contract qualifying his liability. He is not liable for these acts of superior force, because they are not under his control ; in law, as in reason, he only engages against those events which by possibility and due diligence he may prevent.²

His extraordinary liability is founded in some sense upon the reward he receives ; and not, as some have thought, upon the theory of his remedy over against the hundred.³ The liability existed at common law long before that remedy was given by the statute of Winton ; and many cases were so decided previous thereto, on the ground of the reasonable premium to which he was entitled, and which at that time served as a criterion of his liability. On the same ground, a fraudulent misrepresentation or concealment of the value of the goods delivered to him, was held to annul the contract altogether, taking from him, as it does, the reward which ought to be proportioned to the risk incurred.⁴

§ 549. A carrier is considered an insurer, and may like other insurers demand a premium proportioned to the hazards of his employment ; he may require the owner of goods to give such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care necessary to the discharge of the trust ; and although he has no general right in all cases to demand specific knowledge of the contents of a parcel delivered to him, it is incumbent upon him to ascertain the nature and value of the goods, by suitable inquiries or by making known the terms on which he is willing to receive and carry them.⁵ A general notice posted in the carrier's office and other places, is not sufficient to subject the owner to a charge

¹ Jeremy on Car. 31 ; Bell v. Reed, 4 Bin. R. 127.

² Jeremy on Law of Car. 32. See general rule as stated by Chief-Justice CHURCH in Dexter v. Norton, 47 N. Y. 64, and commented upon in Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487.

³ Gibbon v. Poynton, 4 Burr. 2299.

⁴ Titchburne v. White, 1 Stra. R. 145.

⁵ Crouch v. The London & N. W. R. Co., 14 C. B. 255 ; 25 Eng. Law & Eq. 287 ; Walker v. Jackson, 10 Meeson & Welsby, 16.

of fraud; the carrier's only safe course is to announce his terms to every person who applies to him for the carriage of goods, stating them substantially and fairly. And if the owner, on this announcement, give an answer false in a material point, the carrier will be absolved from the consequences of a loss not occasioned by negligence or misconduct.¹

§ 550. The extent of the carrier's liability does not depend on the terms of his contract; it is declared by law. His undertaking, when reduced to form, does not differ from that of any other person who may agree to carry goods from one place to another; and yet one who does not usually exercise this public employment, will incur no responsibility beyond that of an ordinary bailee for hire, and is not answerable for a loss by any means against which he could not have guarded by ordinary diligence. It is not the form of the contract, but the policy of the law, which determines the extent of the carrier's liability.² So that when he is charged as a carrier, it is on the ground of an obligation imposed upon him by law. Over one hundred years ago, Lord Mansfield asserted the doctrine in these words: "It appears from all the cases for a hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is by the common law; a carrier is in the nature of an insurer."³

The law has indeed always recognized the existence of a contract, whilst it has at the same time declared the obligation of the carrier to be a public duty, by allowing the plaintiff to vary the form of his action according to the circumstances of the case, and for the greater convenience of the party injured.⁴ It permits the carrier to be charged in contract, as well as in tort, on a clear principle of mutual equity; that there should be a consideration adequate to the risk on the one side, and due precaution and diligence exerted on the other.⁵ In

¹ *Hollister v. Nowlen*, 19 Wend. 234; *Door v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Blossom v. Dodd*, 43 N. Y. 264. Ante, § 530.

² Per Chief-Justice BRONSON, in *Hollister v. Nowlen*, 19 Wend. 239. The principle is applied in *Merritt v. Earle*, 29 N. Y. 115, 121, 122; and in *Nolton v. Western R. Corporations*, 15 N. Y. 444; and in *Bissell v. M. S. & N. I. R. Cos.*, 22 N. Y. 258, 307; and in *Atlantic Mut. Ins. Co. v. McLoon*, 48 Barb. 27.

³ *Forward v. Pittard*, 1 Term R. 27; 1 Esp. R. 36; *Ansell v. Waterhouse*, 1 Chitty, 1.

⁴ *Boson v. Sandford*, 1 Salk. 440; *Buddle v. Wilson*, 6 Term R. 369; *Dickson v. Clifton*, 2 Wilson, 319; *Dale v. Hall*, 1 Wilson, 282.

⁵ *Jeremy on Car.* 36; *Philadelphia & R. R. Co. v. Derby*, 14 How. U. S. 483; *Farwell v. Boston R. R.* 4 Met. 49; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, 133.

assuming a public employment, he assumes the duties belonging to it; in receiving goods to carry, he makes a private contract; and the law enforces the obligation he assumes, on both grounds according to the form of the action. "If he make a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and therefore he ought in reason and justice to have greater reward."¹

§ 551. There being no special agreement by the carrier, it is not necessary to consider his minor engagements implied by law; the greater includes the less, and the law charges him with the safe custody of the goods as an insurer; it binds him to carry and deliver the goods safely, or to excuse himself by showing a loss of them by superior force.² The mode of carriage and the sufficiency of the vessel or vehicle used by the carrier, becomes important subjects of inquiry only, or mainly, where there has been a special acceptance, or an agreement qualifying his liability; and in these cases it becomes necessary to consider the effect of his contract, in connection with the duties imposed upon him by law.³ If he receive goods for transportation, exempting himself from liability for losses arising from the perils of the sea, the law implies an engagement on his part that his vessel shall be staunch and seaworthy when she starts on her voyage.⁴ So where the cause of a loss on the land is open to investigation, the law implies an engagement on the part of the carrier that the carriage or vehicle used by him, shall be in good order and capable of performing the journey.

V. SPECIAL CONTRACTS.

§ 552. There was at one time in this State a decided drift of opinion in favor of the doctrine, that common carriers should not be permitted to limit their common law liabilities by a special contract; on the ground that limitations of this character tend to encourage negligence and fraud, and are thus contrary to public policy.⁵ After some debate,

¹ *Gibbon v. Poynton*, 4 Burr. 2299.

² *Pazzi v. Shipton*, 1 P. & D. 4; 8 A. & E. 963.

³ *Simmons v. Law*, 8 Bosw. 213; 3 Keyes, 217.

⁴ *Lyon v. Mells*, 5 East, 428; *Putnam v. Wood*, 3 Mass. 481; *Backhouse v. Snead*, 1 Murph. 173; *Bell v. Reed*, 4 Binn. R. 127.

⁵ *Gould v. Hill*, 2 Hill R. 623; in this case COWEN, J., cites a former opinion given in *Cole v. Goodwin*, 19 Wend. 251, 281; a decision by STORY, J., in the case of the Schooner *Reeside*, 2 Sumner, 567, 575, and *Atwood v. The Reliance Transp. Co.*, 9 Watts, 87. See opinion by BRONSON, J., in *Wells v. The Steam Nav. Co.*, 2 N. Y. 204, 209. COWEN, J., cites Lord Kenyon, C. J. A. D. 1793, in *Hyde v. Proprietors of the Trent & Mersey Navigation*, 1 Esp. 36. "There is a difference where a man is chargeable by law generally, and where on his contract. Where a man is bound to

it was considered of great importance to uphold the freedom of individuals to contract in the carrying trade, as in other branches of business; and the rule became firmly settled that a carrier may by express contract restrict his common law liability¹—a broad and general rule which permits the parties to separate the carrier's contract for the transportation and delivery of goods, from the responsibility of insuring them against losses from accidents and casualties by the way.²

The rule is not of recent origin. It has long been the practice of common carriers by water to insert in the receipt of the goods or bill of lading, an exception of the dangers or perils of the river, lakes and seas, and other casualties, such as fire, leakage and breakage; thus entering into a special agreement with the owner for the transportation of the goods, and leaving him to obtain an insurance upon them against the excepted dangers.³ The custom assumes the rule, and being supported by judicial authority, it works a partial separation of the carrying trade from the business of insurance.⁴ A like custom has long prevailed among

any duty, and chargeable to a certain extent by operation of law, in such cases, he cannot by any act of his own discharge himself—as in the case of common carriers, who are *liable by law in all cases of losses* except those arising from the act of God or of the King's enemies; they cannot discharge themselves from losses happening under these circumstances, by any act of their own: “as by giving notice, for example, to that effect. But the case is otherwise where a man is chargeable on his own contract. There he may qualify it as he thinks fit.” He then proceeds. “I have said that relaxing the common law rigor, opens the high road to fraud, perjury, theft and robbery. It does more. Looking to the present ordinary, not to say universal means of travel and transportation, by coaches, railroads, steamboats, packets and merchant vessels, the mere superaddition of negligence in respect to the safety of passengers and property would constitute a most fearful item. There are no principles in the law better settled than that whatever has an obvious tendency to encourage guilty negligence, fraud or crime, is contrary to public policy. Such, in the very nature of things, is the consequence of allowing the common carrier to throw off or in any way to restrict his legal liability. The traveler and bailor is under a sort of moral duress, a necessity of employing the common carrier under those legal arrangements which allow any number of persons to assume that character, and thus discourage and supersede the provision for other modes of conveyance. My conclusion is, that he shall not be allowed in any form to higggle with his customer and extort one exception and another, not even by express promise or special acceptance, any more than by notice. He shall not be privileged to make himself a common carrier for his own benefit and a mandatary or less to his employer. He is a public servant, with certain duties defined by law; and he is bound to perform those duties.”

¹ *Dorr v. N. J. Steam Nav. Co.*, 4 Sandf. 136; *S. C.* 11 N. Y. 485; *Nicholas v. New York Cent. & H. R. R. Co.*, 89 N. Y. 370, 372.

² *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 382.

³ *Gordon v. Little*, 8 Serg. and Rawle, 533.

⁴ *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524; and *Mer. Mut. Ins. Co. v. Calebs*, 20 N. Y. 173.

carriers by land, of limiting their liability, by an express agreement, to a greater or less extent; and these limitations are upheld and enforced under the principles of the common law.¹ The contract is to be carried into effect according to its terms, without enlarging or diminishing them in their true sense and meaning.²

§ 553. We have seen that the carrier, being a public servant, is obliged to accept and take charge of goods for carriage on his route and within his line of business, on being tendered a reasonable compensation;³ and this is manifestly inconsistent with a right on the part of the common carrier to impose terms that will relieve him from the liability imposed upon him by law.⁴ He is by common consent at liberty to prescribe reasonable rules and regulations for the conduct of his business. In regard to the manner of receiving goods, booking, and paying for their transportation, the carrier has, as we have seen, the right to regulate and prescribe his own terms; and if these are not complied with he cannot be charged. But where these terms are complied with, he is bound by reason of his employment to receive and carry the goods tendered to him for carriage.⁵

It follows that special agreements made with carriers for the transportation of goods by land or water, are to be regarded as entered into for the mutual accommodation of the contracting parties. Before the law, they stand upon equal terms; the carrier is tied down to a reasonable reward for his services; and he is under a legal obligation to receive and carry the goods offered to him. It is not therefore within his power to impose unreasonable conditions upon his customers, or by any act of his own to discharge himself from his common law liability. Plain enough in theory, it is quite difficult in practice to adjust the relative rights of the contracting parties.⁶

§ 554. *Public Notices.* It is not necessary to review the decisions

¹ Wyld v. Pickford, 8 M. & W. 443; York, Newcastle & Berwick R. Co. v. Crisp., 14 C. B. 527.

² Magnin v. Dinsmore, 35 N. Y. Supr. Ct. 182; S. C. 56 N. Y. 168; Falkeneau v. Fargo, 35 N. Y. Supr. Ct. 332.

³ Doct. & Stud. 270; Jackson v. Rogers, 2 Show. 327; Lovett v. Hobbs, id. 127; ante, §§ 518 to 522.

⁴ Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith, 115, an elaborate opinion by WOODRUFF, J.; case cited in Nevins v. The Bay State S. Co., 4 Bosw. 225, 233, 236; 5 Bosw. 395, 404; 30 N. Y. 630; 2 Daly 454, 486.

⁵ Ante, §§ 518, 520.

⁶ In some cases we find the rights of the owner delivering the goods, presented in a strong light; in others the rights of the carrier; and in others still the right of the parties to regulate their relations to each other on the basis of contract. In England, as we shall presently find, the carrier's right to impose terms is limited by statute. 1 E. D. Smith, 115; 4 Bosw. 225, 236.

marking the line of oscillation and development of the law, on this subject. The result can be briefly stated. In England the courts gave effect to these notices for a long time; sometimes on the theory that they formed a part of a contract, by the tacit acquiescence of the owner of goods, delivering them with a knowledge of the terms thus offered by the carrier; ¹—a misleading theory inasmuch as it assumes the carrier's right to dictate his own terms; and sometimes on the ground of a fraudulent or deceitful concealment of the nature of the package delivered, practiced with a view to evade paying the established freight.² As these notices were not at all uniform, it was at length ascertained that to give effect to them as parcel of an implied contract, was to undermine the rule of liability imposed upon the carrier by law.³ Cases of negligence arising, it was found difficult to determine the degree of negligence that should defeat the exemption claimed in the notice.⁴ The doctrine of notice finally began to be regretted, and limited and qualified.⁵ It was necessary on the theory of contract, that the notice should be brought home to the knowledge of the party delivering the goods; and this was often found a difficult question of fact to deal with.⁶ The carrier was obliged to receive all packages tendered to him for carriage, and he had no sure means of ascertaining the value of their contents; without which it was not possible for him to secure a just compensation for his services.⁷ The decisions falling into some conflict, a statute was passed in 1830 regulating the rights of the parties, giving to the carrier by land the right to fix his charges for carrying parcels by notice, and taking from him every other right or claim to limit his common law liability by notice.⁸ A like result, so far as

¹ *Leeson v. Holt*, 1 Stark. 148; *Nicholson v. Willan*, 5 East, 507; *Maving v. Todd*, 1 Stark. 72; *Harris v. Packwood*, 3 Taunt. 271; *Brooke v. Pickwick*, 4 Bing. 218; *Marsh v. Horne*, 5 Barn. & Cres. 322.

² *Tyly v. Morrice*, Carth. 485; *Gibbon v. Paynton*, 4 Burr. 2298; *Miles v. Cattle*, 6 Bing. R. 743; *Batson v. Donovan*, 4 Barn. & Ald. 21; *Beck v. Evans*, 16 East. 244.

³ *Barnett v. Willan*, 5 Barn. & Ald. 53, A. D. 1821, discredits some preceding cases.

⁴ *Nicholson v. Willan*, *supra*; *Riley v. Horne*, 5 Bing. 217; 2 Moore & Payne, 331; *Sleat v. Fagg*, and *Wright v. Snell*, 5 Barn. & Ald. 342, 350; *Bickett v. Wilan*, 2 Barn. and Ald. 356; 3 Campb. 267; 16 East, 244; *Bodenham v. Bennett*, 4 Price. 31; 1 Esp. 36.

⁵ *Smith v. Horne*, 8 Taunt. 144, A. D. 1818. BURROUGH, J.: "I lament that the doctrine of notice was ever introduced into Westminster Hall."

⁶ *Brooke v. Pickwick*, 4 Bing. R. 222, A. D. 1827; *Rowley v. Horne*, 3 Bing. R. 2; *Griffiths v. Lee*, 1 Carr. and Payne, 110.

⁷ *Riley v. Horne*, 2 Moore & Payne, 341; 5 Bing. 217.

⁸ 11 Geo. IV., and 1 Wm. IV., Ch. 68, passed July 23, 1830: the principles of the statute were applied to railway and canal companies in 1854, by 17 and 18 Vict. Ch. 31.

the general principle is concerned, has been reached in this country in the natural development of the law, by judicial decisions; and the carrier cannot limit his liability by a notice.¹ Assent by the party delivering the goods must be shown, to give effect to the notice;² and that creates a special contract.

§ 555. Under the statute referred to, mail contractors, stage-coach proprietors and other common carriers for hire by land, are not liable for injury or loss of money, bills, notes, jewelry and other articles of great value in small compass, particularly specified, contained in packages or parcels, when the value of the articles or thing enclosed exceeds the sum of ten pounds, unless the value thereof is declared by the person delivering the same, and a compensation paid or agreed upon for the increased risk incurred in the conveyance of such valuable articles.³ When the contents of a package or parcel of this kind exceeding ten pounds in value, are made known on its delivery, the increased charge is to be paid according to the carrier's notice posted in his office;⁴ a reasonable charge proportioned to the risk assumed by the carrier. On the owner's paying or engaging to pay the increased charge, the car-

¹ *Hollister v. Nowlen*, 19 Wend. 234, A. D. 1838; *Cole v. Goodwin*, 19 Wend. 251. These cases relate to the baggage of a passenger, and the opinions are very elaborate. See also *Clark v. Faxton*, 21 Wend. 153; *Camden & Amboy R. R. & Transp. Co. v. Belknap*, 21 Wend. 354; *Powell v. Myers*, 26 Wend. 591. The rule is applied generally, in *Dorr v. N. J. Steam Nav. Co.*, 4 Sandf. 136; *S. C. 11 N. Y.* 485; and in *Blossom v. Dodd*, 43 N. Y. 264; *Derwart v. Loomer*, 21 Conn. 245; *Moses v. Boston, etc., R. R. Co.*, 32 N. H. 523; *Kimball v. Rutland R. R. Co.*, 26 Vt. 247; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Brown v. E. R. R. Co.*, 11 Cush. 97; *Thomas v. Boston R.*, 10 Met. 479; *Jones v. Voorhees*, 10 Ohio, 145; *McMillan v. Michigan S. R. R. Co.*, 16 Mich. 79; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *Duff v. Budd*, 3 Brod. & B. 177; *Perry v. Thompson*, 98 Mass. 252; *Buckland v. Adams Ex. Co.*, 97 Mass. 124; *Malone v. Boston & W. R. Co.*, 12 Gray, 392; *Brown v. Eastern R.*, 11 Cush. 97; *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Georgia R. R. Co. v. Gann*, 68 Ga. 350.

² *Grace v. Adams*, 100 Mass. 560; *Van Goll v. The S. E. R. Co.*, 104 Eng. Com. Law R. 75. In these cases the party delivering the package took a receipt or paper embodying a contract.

³ The articles enumerated are as follows: Gold and silver coin of the realm or of any foreign state; gold or silver in a manufactured or unmanufactured state, precious stones, jewelry, watches, clocks, or time-pieces of any description; trinkets, bills, notes of any bank in England, Scotland, or Ireland; orders, notes or securities for payment of money, English or foreign; stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles; glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not with other materials; furs, laces, or any of them, contained in any parcel or package.

⁴ The second section of the act permits this in express terms. A public notice does not avail the carrier. *Walker v. The York & North M. R. Co.*, 2 E. & B. 730; 22 Eng. L. & Eq. 315.

rier or his agent is required to give a receipt for the package or parcel, specifying that the same has been insured; and a refusal to give the receipt when required, or an omission to post the notice in his office, deprives the carrier of any benefit to be derived under the act, and leaves him liable as at common law, and liable to refund the increased rate of charge.

There must be a formal declaration of the nature and value of the parcel when it is delivered to the carrier. If the person delivering the goods fail in this duty, when the parcel exceeds in value ten pounds, the carrier is not liable for a loss of or injury to either of the specified articles, by the negligence of his servants or by his own omission to affix the notice in his office, as required by statute.¹ The party delivering the goods and declaring their value, is not bound to tender, but the carrier must demand, the increased charge payable thereon.²

The general features of the statute are quite as important as those already mentioned. The act does not prevent or in any wise affect any special contract made by a carrier for the conveyance of goods and merchandise;³ and it provides in express terms that from and after the first day of September ensuing, no public notice or declaration shall be deemed or construed to limit or in anywise affect the liability at common law of any mail contractor, stage-coach proprietor or other common carrier, in respect of any articles or goods to be carried or conveyed by them;⁴ it leaves nothing to inference; it provides that in respect to all articles and goods not enumerated in the act, the carrier shall be liable for their safe carriage as at common law, and for the enumerated articles also, where they are insured. It restores the rule of the common law.⁵

¹ *Hinton v. Debbin*, 2 G. & D. 36; 2 Q. B. 646; 6 Jur. 601; *Boys v. Pink*, 8 C. & P. 361; *Hart v. Baxendale*, 6 Exch. 759; 16 Jur. 126; 21 L. J. Exch. 123.

² *Great Northern R. Co. v. Behrens*, 7 H. & N. 959; 8 Jur. N. S. 567; 31 L. J. Exch. 299; 10 W. R. 389; 8 L. T. N. S. 328.

³ Section Six of the Act.

⁴ Section Four: this section refers to public notices; a private actual notice assented to becomes a contract. *Walker v. York & North Midland R. Co.*, 2 Ellis & B. 750.

⁵ *Bronson, J.*, in *Hollister v. Nowlen*, 19 Wend. 234, 241, 249.

This statute of 1st William IV., Ch. 68, was passed July 23d, 1830.

Section 1 enacts: "That from and after the passing of this act, no mail contractors, stage-coach proprietors, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland and Ireland respectively, or of any

§ 556. After the statute of 1830 had been in force in England twenty-four years, its principles were applied to other common carriers by the

other bank in Great Britain or Ireland, orders, notes and securities for the payment of money, English or foreign; stamps, maps, writings, title deeds, paintings, engravings, gold or silver plate, or plated goods, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in the parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles, or property aforesaid contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same be accepted by the person receiving such parcel or package."

§ 2. This section permits the carrier, whenever any such parcel or package exceeding ten pounds in value shall be delivered and its contents made known, to demand an increased compensation for the greater risk he runs in the conveyance of such valuable articles; his prices to be regulated by a notice to be posted in his office, by which both parties are to be bound.

§ 3. Provides that the carrier shall give a receipt for the package or parcel as insured, and that if he refuse to give the receipt, he shall refund the insurance money and be liable as at common law.

§ 4. Provides that in respect to all articles not enumerated in the act, the carrier shall be liable for their safe carriage as at common law, and for them also where they are insured; that no notice shall be deemed or construed to limit, or in any way affect the carrier's liability at common law.

§ 5. That all receiving houses shall be deemed those of the carrier, and that any one of a company of carriers may be sued separately.

§ 6. This act shall not annul or affect any special contract made by the carrier for the conveyance of goods and merchandise.

§ 7. If any parcel or package delivered to the carrier, its value and contents being declared and the increased rate paid thereon as insurance, be lost, the owner recovers the value of the parcel with the insurance money paid thereon.

§ 8. Nothing in this act shall be deemed to protect the carrier for hire from his liability to answer for loss or injury to any goods or articles arising from the felonious act of his servant; nor to protect the servant from liability for loss or injury by his personal neglect or misconduct.

§ 9. In a case of loss of articles delivered to the carrier and insured, their actual value, and not the value put upon them on their delivery, is to be the measure of damages; and the owner of them shall make proof of their value, if so required; but the recovery shall not exceed their declared value.

§ 10. The carrier may in all cases pay money into court, as in other actions, and with the same effect.

§ 11. This is a public act to be judicially taken notice of, without being specially pleaded.

Railway and Canal Traffic Act.¹ Under the seventh section, a railway or canal company is liable for the loss of, or for any injury done to any horses, cattle or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition or declaration being thereby declared null and void. There are five provisos or limitations upon the operations of the statute:—

1. That nothing contained in the act shall be construed to prevent these companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable.

2. That no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereafter mentioned; that is to say, for any horse, fifty pounds; for any neat cattle, fifteen pounds per head; for any sheep or pigs, two pounds per head; unless the person sending or delivering the same to the company, shall, at the time of such delivery, have declared them to be respectively of a higher value than as above mentioned; in which case it shall be lawful for the company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge must be notified in the manner prescribed in the Act of 1830, and is made binding upon the company in the manner therein mentioned.

3. That the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury.

4. That no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage.

5. That nothing contained in the act shall alter or affect the rights, privileges or liabilities of any such company under the prior act of 1830, with respect to the articles mentioned in that act.²

¹ 17 and 18 Vict. Ch. 31, A. D. 1854.

² We have referred to the first part of this statute, ante, §§ 519, 520; we give an

§ 557. Without undertaking to review the English decisions under these statutes, it is proper to observe that the later statute contains some provisions not found in the first. *E. g.*, it declares a rule of liability for any loss of, or injury to animals, goods or things, by the neglect of or default of the carrier company, in spite of any notice or condition given or imposed by them; it then allows, in express terms, the carrier company to prescribe such conditions with respect to the receiving, forwarding and delivering animals, goods and things as shall be adjudged by the court to be just and reasonable; and it requires special contracts for the conveyance of these different kinds of property to be signed by the party delivering the same.

The statute was enacted to correct certain abuses practiced by the carrier companies, under the guise of contracts, imposed upon customers by the use of special notices and tickets,¹—contracts that were sometimes established by proving that the company had given to the party delivering the property a written notice or ticket specifying the terms on which they received and conveyed the same. And these contracts often went so far as to exempt the carrier company from liability for losses and injuries caused by the culpable negligence of its agents and servants; and were held binding on the parties to them.²

One purpose of the statute evidently was, to prevent the carrier from imposing contracts or conditions of this description upon unwary customers; and another was to protect all customers against the arrogant demands of the carrier. The statute annuls all notices given by railway and canal companies, limiting their liability as carriers; and it does not prevent them from entering into special contracts for the carriage of goods, provided the conditions contained in them are such as are held just and reasonable by the judge or court before whom the question relating thereto is tried, and provided the contract is signed by the party delivering the goods to be carried. All parts of section seven of the act, are read together; and the conditions therein mentioned limiting the carriers' liability, must be just and reasonable in the opinion of the

abstract of the statute. It covers all domestic animals, including dogs. *Harrison v. London, Brighton & South Coast R. Co.*, 2 B. & S. 122.

¹ *York, Newcastle & Berwick R. Co. v. Crisp*, 14 C. B. 527; *Hughes v. Great Western R. Co.*, 14 C. B. 637; *Slim v. Great Northern R. Co.*, 14 C. B. 647; *Chippendale v. Lancashire & Yorkshire R. Co.*, 7 Railw. Cas. 824; *Great Northern R. Co. v. Morville*, 7 Railw. Cas. 830; *Show v. York & North Midland R. Co.*, 6 Railw. Cas. 87; 13 Q. B. 347; *Austin v. Manchester, Sheffield & L. R. Co.*, 16 Q. B. 600; 10 C. B. 454.

² *Idem*; *Austin v. Manchester, Sheffield & L. R. Co.*, 10 C. B. 454; *Carr v. Lancashire & Yorkshire R. Co.*, 7 Exch. 707; 7 Railw. Cases, 426; *Walker v. York & North Midland R. Co.*, 2 Ellis & Bl. 750.

court, and they must be embodied in a special contract in writing, signed by the sender of the goods.¹ The statute must be complied with, the conditions must be contained in the contract, and the contract must be signed.²

What are *just and reasonable conditions*, under the statute? These following conditions have been adjudged just and reasonable, when embraced in a contract for the conveyance of ordinary goods and chattels: "The company will not be answerable for the loss of goods untruly or incorrectly described; no claim for loss will be allowed unless made within seven days after the time when the goods should have been delivered;"³ and a condition that no claim for damage will be allowed, unless made within three days after the delivery of the goods;⁴ and a condition that the company will not be liable for damages arising from the loss of a market, in consequence of delay in the transit;⁵ and a condition that the company will not be liable for the loss of goods, however caused, when carried at special mileage rates.⁶ The following conditions have been held unjust and unreasonable; namely, a condition that the company will not be accountable for the loss, detention or damage of any package insufficiently or improperly packed;⁷ and a condition that the company will not be responsible for the loss of, or injury to any marbles unless insured according to their value;⁸ and conditions exempting the company from liability for loss of, or injury to cattle and horses, not caused by the negligence of its agents and servants.

§ 558. Congress has declared by statute that where the shipper of certain specified articles, contained in a parcel or package or trunk, shall lade the same as freight or baggage on a vessel, without at the same time giving to the master, clerk, agent or owner, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor; the master and owner shall not be liable as carriers thereof in any form or manner, and shall not be liable for such

¹ *Simons v. Great Western R. Co.*, 18 C. B. 805; *Peep v. North Staffordshire R. Co.*, 10 H. L. Cas. 474.

² *Aldrich v. Great Western R. Co.*, 15 C. B. N. S. 582; *M'Manus v. Lancashire & Yorkshire R. Co.*, 4 H. & N. 327; *Lewis v. Great Western R. Co.*, 5 H. & N. 867.

³ *Lewis v. Great Western R. Co.*, 5 H. & N. 867; see *Knell v. U. S. & Brazil S. Co.*, 1 Jones & Spencer, 423, 438.

⁴ *Simons v. Great Western R. Co.*, 18 C. B. 805.

⁵ *Beal v. South Devon R. Co.*, 3 H. & C. 337; 5 H. & N. 875; *White v. Great Western R. Co.*, 2 C. B. N. S. 7.

⁶ *Simons v. Great Western R. Co.*, 18 C. B. 804.

⁷ *Idem*; and *Garton v. Bristol & Exeter R. Co.*, 1 B. & S. 112.

⁸ *Peek v. North Staffordshire R. Co.*, 1 Ellis, Bl. & El. 958; S. C. 10 H. L. 473; 4 Best & Smith (Am. Ed.), 1005.

goods beyond the value and according to the character thereof so notified and entered.¹ The statute also limits the liability of the owner of any vessel for embezzlement, loss or destruction of any property, goods, or merchandise shipped or taken on board, or for any loss, damage or injury or forfeiture occasioned or incurred, by collision or otherwise, without his privity or knowledge, to the amount of his interest in the vessel, and her freight then pending. In order to protect the ship-owner and secure this interest to the freighters and owners of the goods in proportion to their respective losses, the statute allows the owner of the vessel or the owner of any part of the goods to take the appropriate proceedings in any court of competent jurisdiction; it permits the owner of the vessel to discharge himself from liability for such losses by transferring his interest in the vessel and freight to a trustee to be appointed by the court, to act for the persons legally interested; and it declares that the charterer of any vessel, who mans, victuals, and navigates it at his own expense, shall be deemed the owner, within the exemption given by the statute; and that the vessel shall be liable as if navigated by the actual owner.² The statute does not otherwise limit the ship-owner's liability; and it is not to be construed to take away or effect the remedy to which any party is entitled against the master, officers or seamen, for or on account of any embezzlement, injury, loss or destruction of merchandise or property put on board the vessel, or on account of any negligence, fraud or other malversation of these persons; and the statute does not lessen or take away any responsibility to which any master or seaman is legally liable. It is also to be noticed that the limitation of liability does not apply to the owners of any canal-boat, barge, or lighter, or to any vessel used in rivers or inland navigation;³ and that it does not exempt the owner from liability for losses or injuries caused by his own misconduct or neglect.

§ 559. The act of Congress limiting the liability of ship-owners, em-

¹ R. S. of U. S. 831, 832. These are the articles specified in the statute, viz.—Platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them contained in any parcel or package or trunk. The enumeration, now much broader than the Act of 1851, is almost the same as that contained in the English statute of 1830. Ante, § 555, and note. See *Wheeler v. O. S. N. Co.*, 125 N. Y. 155.

² R. S. of U. S. §§ 4283, 4284, 4285, 4286.

³ R. S. of U. S. §§ 4287, 4289; ante, § 543, relating to losses by fire.

bodies the principal features of prior English statutes ;¹ and its object is to exempt the owners of ships from the onerous liability under which they were held by the common law for the acts or neglects of their agents and servants or third persons, without their knowledge or concurrence ; and leave them liable for losses arising from the misconduct or negligence of their agents and servants, or from collisions or other casualties excepting fire, to the extent of their interest in the ship and the pending freight. We have seen that they are not liable under the statute for losses by fire, unless the same are caused by their design or neglect ; and that they are thus liable for losses arising from fire, occurring from their neglect.² And we find that the neglect of the president and directors of a corporation, owning a ship, is to be regarded as the neglect of the corporation itself, these officers not being merely agents or servants of the corporate body.³

The statute applies to the owners of vessels navigating the Northern Lakes and the river St. Lawrence, forming the boundary between the States and the possessions of Great Britain ; and Long Island Sound.⁴ It covers losses caused by a collision, occurring in consequence of the inattention or negligence of the master and servants on board. But in order to secure the protection of the statute, a party interested must initiate proceedings in a competent court, namely, in the United States District Court acting as a court of admiralty ; and the ship-owner must make the assignment required by the statute, or perform some equivalent act, such as having his interest appraised and bringing the money into court. Omitting to take any proceeding, he is liable to an action

¹ See Act of Congress of 1851, Chap. 43, § 2 ; and R. S. of U. S. 831, 832 ; Stat. of 1871, Chap. 100, § 69 ; U. S. Rev. St. § 4281 ; also 7 George II. A. D. 1734 ; 26 George III. A. D. 1786 ; 53 George III. A. D. 1813 ; and statutes of Mass. and Maine, enacted as early as 1818 and 1821. *The Rebecca*, Ware, 187, 194 ; see Merchants' Shipping Act, 1854, and Amendment Act, 1862, applied in *London & S. Western R. Co. v. James*, 4 English (Moak), R. 869.

² Ante, § 543 ; *Knowlton v. Providence & N. Y. Steamship Co.*, 53 N. Y. 76 ; *Norwich Co. v. Wright*, 13 Wallace, 104 ; *New York Cent. R. R. Co. v. Lockwood*, 17 Wallace, 357 ; *Hill Manuf. Co. v. Providence, etc., Steamship Co.*, 113 Mass. 495. The act affects the liability of the ship-owner *as carrier* but not *as bailee for hire*. *Wheeler v. O. S. N. Co.*, 125 N. Y. 155.

³ *Phila. Wilm. & Baltimore R. v. Quigley*, 21 How. U. S. 202, 210 ; *Gilman v. Eastern R.* 13 Allen, 433, 441 ; *Hill Manuf. Co. v. Prov. & N. Y. Steamship Co.*, 113 Mass. 495.

⁴ *Moore v. American Transp. Co.*, 24 How. U. S. 1 ; *Knowlton v. Providence & N. Y. Steamship Co.*, 53 N. Y. Superior Ct. 370 ; 53 N. Y. 76. In *Baird v. Daly*, 4 Lansing, 426, the transaction occurred on the St. Lawrence, and the opinions rather assume that the statute applies.

in a State court ;¹ and it is adjudged that the jurisdiction of a State court over an action commenced against a ship-owner for damages caused by his neglect, will not be affected by a subsequent suit commenced in a federal court.² While the statute of the United States confers exclusive admiralty and maritime jurisdiction upon the District Courts, it reserves to the suitor the option of seeking redress at common law, even where his right is based upon a State statute.³

When the owners of a vessel, which by a collision without fault on their part causes injury and loss to the goods on board and to the other vessel and cargo, take proceedings in the proper court, and have their interests appraised and the value brought into court, the amount, being insufficient to pay all the damages, will be apportioned *pro rata* amongst the owners of the injured vessel and of the cargoes of both vessels in proportion to their respective losses.⁴ But neither the owner nor the charterer of a vessel can escape liability, where he negligently runs down another vessel.⁵

§ 560. It may be safely assumed that a carrier cannot limit his liability by a mere notice, public or private, of the terms on which he receives and carries goods or property ; inasmuch as it cannot be presumed that the owner delivering the goods or property intended to waive his legal rights ; the presumption being quite as strong that he intended to insist upon them.⁶ The notice is at most only a proposal ; it does not bind the person delivering the goods, unless he assents to the terms proposed to him. The delivery of a receipt, check, or ticket, with a notice indorsed upon it, does not of itself create or imply a contract on the part of the person receiving it. A ticket is not regarded as a contract ; it is treated as a receipt, it serves as a token, a permit to indicate the bearer's right to be received on board the car or vessel.⁷ It may be, and often

¹ *Norwich Company v. Wright*, 13 Wallace, 104; see rule 54 in admiralty, in same volume.

² *Hill Manuf. Co. v. Prov. & N. Y. Steamship Co.*, 113 Mass. 495; *Knowlton v. Prov. & N. Y. S. S. Co.*, 33 Super. Ct. 370; S. C. 53 N. Y. 76.

³ *Dougan v. Champlain Transp. Co.*, 6 Lans. 430; S. C. 56 N. Y. 1; *Chase v. The Amer. Steamboat Co.*, 9 R. I. 420; S. C. 16 Wallace, 522.

⁴ *Norwich Co. v. Wright*, 13 Wallace, 104.

⁵ *Thorp v. Hammond*, 12 Wallace, 408.

⁶ *Camden R. v. Belknap*, 21 Wend. 354; *Clark v. Faxton*, 21 Wend. 153; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *McMillan v. Michigan S. R. Co.* 16 Mich. 79; *Henderson v. Stevenson*, 13 English (Moak) R. 141, 152, note; *Dak. Civ. Code*, § 1261.

⁷ *Quimby v. Vanderbilt*, 17 N. Y. 306. *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; *Blossom v. Dodd*, 43 N. Y. 264; *Isaacson v. New York Cent. & H. R. R. Co.* 94 N. Y. 278, 286; *Kansas City, etc., R. R. Co. v. Rodebaugh*, 38 Kansas, 45; *Mauritz v. N. Y. L. E., etc., R. R. Co.*, 23 Fed. Rep'r, 705.

is considered as a part of the contract; *e. g.*, where it is negotiated for on special terms.¹ But it does not so embody the contract, as to exclude other evidence of its terms. To give it effect as evidence of a contract, it must be proved that the party receiving it, assented to the conditions indorsed upon it.² The same rule has been applied, where the carrier delivered to a passenger a card or check for his baggage, having these words with others indorsed upon it: "Liability limited to \$100, except by special agreement to be noted on this card."³ Notices of this kind, printed in small type, on the side or back of a receipt or card for baggage, do not form a part of the contract.⁴ A ticket with a like limitation indorsed upon it, in the English language, delivered to a German who does not understand the language, does not charge him with knowledge of the proposed limitation; and his assent cannot be implied; the notice must be brought to his knowledge.⁵ There must be evidence given, from which the party's assent may be inferred.⁶

§ 561. On the other hand, taking from the carrier a receipt for goods in the nature of a bill of lading, embodying a contract specifying the terms on which they are to be carried and delivered, does bind the party delivering the property.⁷ In the absence of fraud, concealment or improper practice, the presumption is that the party taking the receipt, assents to its terms limiting the carrier's common law liability.⁸ He is supposed to know, and is chargeable with knowledge of the contents of the receipt;

¹ Bissell v. N. Y. Central R. R. Co., 25 N. Y. 442; Wells v. N. Y. Central R. R. Co., 24 N. Y. 181; Perkins v. Central R. R. Co., 24 N. Y. 196; Wells v. N. Y. Steam Nav. Co. 8 N. Y. 375.

² Nevins v. The Bay State S. Co., 4 Bosw. 225; McCotter v. Hooker, 8 N. Y. 497; Sunderland v. Westcott, 2 Sweeney, 260; Lake Shore & M. S. Ry. Co. v. Davis, 16 Ill. App. 425.

³ Prentice v. Decker, 49 Barb. 21; Brown v. Eastern R. R. Co., 11 Cush. 97; Limburger v. Westcott, 49 Barb. 283; 34 How. Pr. 421; Parker v. Southeastern R. Co., 1 C. P. D. 418; Harris v. Great Western R. Co., 17 English (Moak) R. 156; Grossman v. Dodd, 63 Hun, 324; Isaacson v. New York. Cent. & H. R. R. Co. 94 N. Y. 278; Madan v. Sherard, 73 N. Y. 329; Woodruff v. Sherrard, 9 Hun, 322.

⁴ Blossom v. Dodd, 43 N. Y. 264.

⁵ Camden, etc., R. R. Co. v. Baldauf, 16 Penn. St. 67; see Fibel v. Livingston, 64 Barb. 179.

⁶ Verner v. Sweitzer, 32 Penn. St. 208; Farmers', etc., Bank v. Champlain Transp. Co., 23 Vt. 186. No contract arises as a matter of law from such receipt. The carrier in order to relieve himself from liability must establish a contract. Grossman v. Dodd, 63 Hun, 324; Madan v. Sherard, 73 N. Y. 329.

⁷ Long v. N. Y. Central R. R. Co., 50 N. Y. 76; Dorr v. N. J. Steam Nav. Co., 4 Sandf. 136; S. C. 11 N. Y. 485; Harris v. Great Western R. Co., 1 Q. B. D. 515; Adams Ex. Co. v. Haynes, 42 Ill. 89.

⁸ Belger v. Dinsmore, 51 Barb. 69; S. C. 51 N. Y. 166; Collender v. Dinsmore, 55 N. Y. 200; Kirkland v. Dinsmore, 62 N. Y. 171.

and where he takes it without objection, he is presumed to have assented to the conditions prescribed in it, qualifying the carrier's liability.¹ Thus, a receipt embracing these terms is held operative and valid, like a bill of lading: "It is further agreed, and is a part of the consideration of this contract, that the Adams Express Company are not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from any cause whatever, unless specially insured by them and so specified in this receipt; which insurance shall constitute the limit of the liability of the Adams Express Company in any event; and if the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid (receipted in the first paragraph)." ² The contract is evidently designed to protect the carrier to the same extent and in the same manner as the English statute relating to parcels of great value in small compass.³ Its terms relieve the carrier from liability for any loss or damage, unless the value of the goods is stated by the shipper, and the goods insured, and that fact stated in the receipt; and it is clear that the statute referred to relieves the carrier from liability for loss or injury to any of the specified articles, notwithstanding the injury or loss is occasioned by his servant.⁴ And it is adjudged in this State that the last clause of the contract above

¹ *Grace v. Adams*, 100 Mass. 560; *Van Goll v. The S. E. R. Co.*, 104 Eng. Com. Law R. 75; *Fibel v. Livingston*, 64 Barb. 169; case of a receipt given to a German not much acquainted with the language. It is a general rule that where goods are delivered to a carrier for transportation, and before the goods are shipped, a bill of lading is delivered by him to the shipper, the latter is bound to examine it and ascertain its contents, and if he accepts it without objection he is bound by its terms and cannot set up ignorance of its contents or resort to prior parol negotiations to vary them. *Guillaume v. General Transp. Co.*, 100 N. Y. 491; *Germania Fire Ins. Co. v. Memphis, etc., R. R. Co.*, 72 N. Y. 90; *O'Brian v. Kinney*, 74 Mo. 125; *Mulligan v. Ill. Cent. Ry. Co.*, 36 Iowa, 181; *St. Louis, Kans. City & N. R. R. Co. v. Cleary*, 77 Mo. 634.

But this rule does not apply where there was a parol contract which had been acted on and the goods had been shipped under it before the bill of lading was delivered to the shipper. *Bostwick v. Baltimore & Ohio R. R. Co.*, 45 N. Y. 712; *Guillaume v. General Transp. Co.*, 100 N. Y. 491; *Wheeler v. N. B. & C. R. R. Co.*, 115 U. S. 29; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206; *Louisville, etc., R. R. Co. v. Meyer*, 78 Ala. 597; *American Exp. Co. v. Spellman*, 90 Ill. 455; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438; *Park v. Preston*, 108 N. Y. 434.

² There are other clauses in the contract; and the above only are adjudged valid in *Magnin v. Dinsmore*, 56 N. Y. 168.

³ *Ante*, § 555.

⁴ *Hinton v. Dibbins*, 2 G. & D. 36.

quoted, does not exempt the carrier from losses occurring through his negligence; and that the limitation of damages to the sum of fifty dollars does not apply to these losses.¹ The language is very broad, but it does not in terms cover losses by negligence; and under the usual rule of interpretation, the terms are to be taken most strongly against the party whose language they are.²

§ 562. The freedom of contract has been carried so far in England³ and in this State, as to uphold the carriers' contract exempting him from liability beyond a fixed sum, for losses occurring through his negligence;⁴ and yet we find the courts holding conservatively that a contract of this kind shall be permitted to exempt a carrier from losses occasioned by his negligence, only in compliance with its express terms;⁵ and that the carrier must give some account of the goods;⁶ unless the contract, or the evidence in the action, leaves the burden of proof with the plaintiff.⁷

It is to be observed that contracts exempting carriers from liability for losses and injuries caused by their own negligence, would operate to suspend the obligation of diligence which the law prescribes as governing the relation of the parties to each other; and that these contracts are not therefore in harmony with sound public policy. On the other hand, the courts of England and of this State permit the carrier to exempt himself by an express contract from liability for damages resulting from negligence on the part of his servants, agents, and employees, without regard to the degree of the negligence⁸—a rule

¹ *Magnin v. Dinsmore*, 56 N. Y. 168.

² *Westcott v. Fargo*, 6 Lansing, 319; *Oppenheimer v. The U. S. Express Co.*, 9 Albany Law Journ. 187; 56 N. Y. 174.

³ *Carr v. Lancashire & Yorkshire R. Co.*, 7 Exch. 707; 7 Railw. Cas. 426.

⁴ *Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Liverpool, New York & P. Steam S. Co.*, 57 N. Y. 1; *Magnin v. Dinsmore*, supra; *Cragin v. N. Y. Central R. R. Co.*, 51 N. Y. 61.

⁵ *Steinweg v. Erie Railway*, 43 N. Y. 123; *Guillaume v. Hamburg & Amer. Packet Co.*, 42 N. Y. 212; *Lamb v. Camden & Amboy Co.*, 46 N. Y. 271; *Bostwick v. Baltimore & Ohio R.*, 45 N. Y. 712; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *Nicholas v. N. Y. C. & H. R. R. R. Co.*, 89 N. Y. 370; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438; *Holsapple v. Rome, W. & O. R. R. Co.*, 86 N. Y. 275; *Kenney v. N. Y. C. & H. R. R. R. Co.*, 125 N. Y. 422; *Canfield v. Baltimore & O. R. R. Co.*, 93 N. Y. 532.

⁶ *Steers v. Liverpool, N. Y. & Phila. S. Co.*, 57 N. Y. 1.

⁷ *Cochran v. Dinsmore*, 49 N. Y. 249.

⁸ *Wells v. N. Y. C. R. Co.*, 26 Barb. 641; *S. C.* 24 N. Y. 181; *Bissell v. N. Y. C. R. Co.*, 25 N. Y. 442; *Cragin v. N. Y. C. R. Co.*, 51 N. Y. 61, 64; 166; *Lee v. Marsh*, 42 Barb. 102; *Keeny v. Buffalo & N. Y. & Erie Co.*, 4 Keys, 108; 59 Barb. 104; *Gallin v. London & N. Western R. Co.*, 12 English (Moak), 268; *Carr v. Lancashire, etc., R. Co.*, 14 Eng. Law & Eq. 340; *Austin v. Manchester, etc., R. Co.*, 70 id. 434.

accepted with much reluctance and frequently criticised by the court that enforces it,¹ and we may add, constantly qualified and restricted by the interpretations given to the contract.

For illustration : an agreement by the owners of a steamboat to tow a vessel on the river, at the risk of the master and owner of the vessel, does not, as interpreted by the courts, relieve the contractor from the exercise of good faith and some diligence in the fulfillment of his contract. The general words, "at the risk of the master and owner," are understood to cover the risk of navigation, and not as giving the owners of the steamboat a license to act negligently and falsely in the business.² So when the owner shipping goods releases the carrier "from liability for damage or loss to any article by fire," the stipulation is made on the legal implication that the carrier cannot reap the benefit of it, where the loss occurs through his negligence, even by the agency of fire.³ The terms of exemption are to be carried into effect, without enlarging their true scope and meaning.⁴

§ 563. While the effect and mode of enforcing contracts differ but slightly in the different States, we find quite recently a decided current of opinion, denying to the common carrier the right to make conditions and stipulations inconsistent with the principal contract. The doctrine assumes the form of these distinct propositions: 1, that a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law; 2, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; 3, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter; 4, that a drover travelling on a pass, for the purpose of taking care of his stock on the train, is a passenger for hire.⁵

¹ *Stinson v. N. Y. C. R. Co.*, 32 N. Y. 333, 337; *Perkins v. N. Y. C. R. Co.*, 24 N. Y. 196; *Smith v. N. Y. C. R. Co.*, 29 Barb. 132; S. C. 24 N. Y. 222.

² *Wells & Tucker v. Steam Nav. Co.*, 8 N. Y. 375; *Alexander v. Greene*, 7 Hill, 533; *D. & C. Steam Towboat Co. v. Starrs*, 69 Penn. St. 36; and see *Canfield v. Baltimore & O. R. R. Co.*, 93 N. Y. 532.

³ *Steinweg v. The Erie Railway*, 43 N. Y. 123; *York Co. v. Cent. R. R.*, 3 Wallace, 107.

⁴ *Gleadell v. Thompson*, 56 N. Y. 194; *Guillaume v. Hamburgh & Am. Packet Co.*, 42 N. Y. 212; 46 N. Y. 271.

⁵ *Railroad Company v. Lockwood*, 17 Wallace, 357, 384. The opinion in this case by Mr. Justice BRADLEY contains an elaborate review of modern decisions, and his conclusions were concurred in by the unanimous judgment of the court; and were afterward reaffirmed in *Railroad Company v. Pratt*, 22 Wallace, 123, 134. See *Henderson v. Stevenson*, 13 English (Moak) R. 141, and note, 152; *Carroll v. Missouri Pacific Ry. Co.*, 89 Mo. 239.

A carrier's agreement to carry and deliver goods for hire, with a stipulation on his part that he is not to be held liable for their loss by the negligence of his servants, has on the face of it a double and doubtful look.¹ An individual would scarcely propose such a contract. "It would require a man of a good deal of effrontery to ask another to insert in his contract for performing a service, a clause permitting him to be negligent in its performance, and relieving him from all liability for the injuries which his gross negligence might occasion; and the man who would insert such a clause in the contract would be a fit subject for a committee to take charge of his person and property."²

¹ *Commonwealth v. Vt. & Mass. R. Co.*, 108 Mass. 7. Here, under an indictment of the railroad company for causing the death of a passenger by its gross negligence, a like stipulation for exemption was treated as a nullity.

² Judge MASON, interpreting a contract to tow a boat at the risk of the owner of it: 8 N. Y. (4 Sed.), 315, 380. Judge SHARSWOOD throws the contract into this form: "We do not undertake to tow the boat as we ought." 69 Penn. St. 36.

Graham & Co. v. Davis & Co., 4 Ohio St. 262. The carrier may exonerate himself by a special contract from liability for losses arising from causes over which he has no control and to which his own fault or negligence does not in any way contribute; but he cannot relieve himself from responsibility for losses caused by his negligence or want of care and skill. "The dangers of river navigation, fire and unavoidable accidents excepted;" under a bill of lading containing this exception, after the plaintiff proves a non-delivery of the goods, the carrier must show a loss within the terms of the exception, and that proper care and skill were exercised to prevent the loss.

Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1 (A. D. 1869). Curran rode in a car on a drover's pass, having indorsed upon it these words: "The person accepting this free ticket assumes all risk of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket, and agrees that as for him, he will not consider the company as common carriers, or liable as such." And the court held that the stipulation exempting the company from liability for negligence, was against the policy of the law and void. *Penn. R. Co. v. Henderson*, 51 Penn. St. 315. See *Knowlton v. Erie R. Co.*, 19 Ohio St. 260. In *Illinois (Ill. Central R. R. Co. v. Reed*, 37 Ill. 484), carriers are not permitted to exempt themselves from liability, by a special contract, for willful misfeasance or gross negligence by themselves or by their agents and servants.

Mann v. Birchard, 40 Vt. 326. A railway company cannot in this State so limit its responsibility that it can carry freight for a reward, and at the same time not be liable for a failure to exercise ordinary care in the business. In *Lancaster Co. National Bank v. Smith*, 62 Penn. St. 47, 55, the court held that a bailee cannot stipulate against liability for his own negligence; and in *Wolf v. Western U. Tel. Co.*, 62 Penn. St. 83, that a carrier may limit his responsibility by express contract, when it does not cover neglect of duty. In *Empire Transp. Co. v. Wamsutta Oil Co.*, 63 Penn. St. 14, the court again holds that a carrier cannot by notice or limitation in a contract or bill of lading, protect himself from liability for the negligence of himself or his servants; and in *Colton v. Cleveland & Pittsburgh R. Co.*, 67 Penn. St. 211, it was held

§ 564. Under the line of English decisions giving effect to the carrier's notice, prior to the statute already mentioned, the carrier was not allowed to exempt himself from liability for losses caused by gross negligence on the part of himself or his servants.¹ And the custom was to submit the question to the jury as one of fact; ² giving them liberty

that an exception of losses by fire in a bill of lading, did not excuse the carrier where the fire occurred through his negligence. 69 Penn. St. 36; *American Ex. Co. v. Second Nat. Bank*, 69 Penn. St. 394, A. D. 1871, the doctrine is again asserted that common carriers cannot so limit their liability by special notice or contract as to relieve themselves from the consequences of their own or their servants' negligence.

In Illinois, it is adjudged contrary to good morals and public policy that common carriers should be allowed to stipulate against their own gross negligence or that of their employees, or their willful defaults. Ill. Central R. R. Co. v. Adams, 42 Ill. 474, 488. They are not allowed to relieve themselves from reasonable care and diligence. *Adams Ex. Co. v. Stettaners*, 61 Ill. 184; *York Co. v. Central R. R. Co.*, 3 Wallace, 113; *Farnham v. Camden & Amboy R. Co.*, 55 Penn. St. 58; the carrier's stipulation will not relieve him from liability for actual carelessness, as where he has a choice of two routes and one of them is dangerous, and he goes by that one and loses the property. *Ex. Co. v. Kountze*, 8 Wallace, 342, 352.

School District v. B. H. & Erie R. Co., 102 Mass. 552; here the court holds that a special contract to carry castings at the shipper's risk of injury during the transportation, does not exempt the carrier from liability for injuries to the goods arising from negligence. And in the *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344, 383, the court holds that a stipulation by the carrier that the property shall remain at the shipper's risk does not exempt the carrier from liability for willful misconduct, gross negligence, or want of ordinary care, relating to the ship, her equipments, and furniture, and management.

Ind., Pittsburgh & C. R. R. Co. v. Allen, 31 Ind. 394. A common carrier is not allowed to contract against liability for loss arising from his ordinary negligence; the stipulation is void as against public policy. He is not permitted to shield himself by agreement from liability for the loss of goods arising from his own negligence, or from the negligence of his agents and servants. He can no more stipulate for a slight degree of negligence, than for gross negligence. *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448. The principal contract is not to be defeated by exceptions. *Great Western R. Co. v. Hawkins*, 18 Mich. 427.

Sager v. Portsmouth, S. & P. & E. R. R. Co., 31 Maine, 228. The Court discusses the doctrine of notice, and holds that no notice or contract will exonerate a common carrier from liability for damage, occasioned by his negligence, or misconduct. In *Fillebrown v. The Grand Trunk R. Co.*, 55 Maine, 462, the doctrine of notice is admitted, where the party delivering the goods assents to the terms proposed; and the court cites *Buckland v. Adams Ex. Co.*, 97 Mass. 125. It must appear that the party delivering the goods assented to the exemption. *Adams Ex. Co. v. Haynes*, 42 Ill. 89.

¹ *Birkett v. Willon*, 2 B. & A. 356; *Beck v. Evans*, 16 East, 244; 3 Camp. 267; *Bodenham v. Bennett*, 4 Price, 31; *Smith v. Horne*, 2 Moore, 18; 8 Taunt. 144; *Garnett v. Willon*, 5 B. & A. 53; *Sleat v. Fagg*, 5 B. & A. 342; *Beckford v. Crutwell*, 5 C. & P. 242; *Riley v. Horne*, 5 Bing. 217.

² *Duff v. Budd*, 6 Moore, 469; 3 B. & B. 177; *Batson v. Donovan*, 4 B. & A. 21.

to hold the carrier liable for the want of that reasonable care and skill which may properly be expected from him.¹

Under the statute of 1830 the carrier is allowed to make a special contract for the carriage of goods, with the same freedom as he might prior to its passage;² and there is nothing in the statute to increase his freedom in the making of special contracts. He is obliged under the statute to accept and carry goods when tendered to him;³ and he is at liberty to demand full freight for their transportation according to their value; and he may prescribe by express notice to the party delivering goods, belonging to the enumerated class, the terms on which he receives them, which will amount to a special contract. Receiving goods in this manner, he is held bound to take ordinary care of them.⁴ The fourth section of the statute, covering goods not enumerated, was interpreted as applying only to public notices given by the carrier.⁵ And in respect to the goods enumerated in the first section, delivered without declaring their value and paying the insurance rates on them, the carrier was exempted from liability for the loss of them through or by means of any degree of negligence on the part of himself or his servants.⁶ Under this interpretation of the statute, the English decisions leave parties sending packages without declaring their value and insuring them, without much protection; they make the carrier liable for a loss of a package by the misconduct of servants, only when the injury or loss arises from the felonious act of his servant.⁷

§ 565. From an early day the carrier has been exonerated by notice and without notice, from liability for the loss of goods and parcels delivered to him in such a manner as to withdraw attention from their true nature and value: as where a merchant packs a trunk with silks and other fine goods of great value, and delivers it to the carrier without calling his attention to its contents;⁸ or where the carrier has given notice that he will not be answerable for parcels of value unless entered and paid for as such, and the owner with a knowledge of this, delivers a parcel containing bank notes to a large amount, without in-

¹ *Beal v. South Devon R. Co.*, 3 H. & C. 337; 12 W. R. 1115.

² *Ante*, § 555; 1 Wm. IV. & 11 Geo. IV. Ch. 68.

³ *Pickford v. The Grand Junction R. Co.*, 8 Mees and Wels. 372.

⁴ *Wyld v. Pickford*, 8 Mees. & Welsby, 443.

⁵ *Walker v. York & North M. R. Co.*, 2 Ell. & B. 750; 22 Eng. L. & Eq. 315.

⁶ *Hinton v. Dibbin*, 2 Q. B. 646; 2 Adolph. and Ellis, N. S. 646. Lord DENMAN interprets the statute by a full consideration of the different sections, finally giving full effect to the broad language of the first section.

⁷ Section 8; *Hearn v. London & South W. R. Co.*, 10 Exch. 793; 29 Eng. L. & Eq. 494.

⁸ *Pardee v. Drew*, 25 Wend. 459.

forming the carrier of its contents;¹ or where the owner delivers a box or a valise containing money, to a carrier without in any manner calling his attention to its value, so as to insure proper care of it;² or where the owner delivers to the carrier a diamond pin, in a box, in such a manner as to induce him to regard the contents of the box as of trifling value;³ or where a carrier is engaged in transporting and delivering letters, and receives one containing an article of special value without any notice of its contents or value;⁴ or where things of great value are packed in a box so as to give the impression that it is of little value, and thus delivered to the carrier.⁵ The use of any means or artifice of such a nature as to mislead the carrier, will relieve him from any liability beyond the apparent value of the article.

Under a special acceptance by the carrier, limiting his liability to the sum of fifty dollars unless specially insured and receipted, the owner delivering a package worth over two thousand dollars without disclosing its contents, is not permitted to recover the value of the parcel, on showing a loss of it by ordinary negligence on the part of the carrier. The shipper's silence in regard to its value, on delivering the parcel, is fraud in law, sufficient to preclude a recovery.⁶ By agreeing with the carrier on a limited liability, he does in effect represent the package as an ordinary article; he indicates his judgment in respect to the care required in its transmission; he treats it, he pays the charge on it as a thing of little value; and, under the circumstances, without regard to his actual intent, his concealment of its value amounts to a fraud in law upon the carrier.⁶

¹ *Batson v. Donovan*, 4 Barn. & Ald. 21; and *Marsh v. Horne*, 5 Barn. & Cres. 322; *Harris v. Packwood*, 3 Taunt. 364; *Levi v. Waterhouse*, 1 Price R. 280. Ante, §§ 529, 530.

² *Chicago & A. R. R. Co. v. Thompson*, 19 Ill. 578.

³ *Southern Ex. Co. v. Everett*, 57 Ga. 688.

⁴ *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185.

⁵ *Warner v. Western Transp. Co.*, 5 Robt. 490.

⁶ *Magnin v. Dinsmore*, 62 N. Y. 35. The opinion by FOLGER, J., contains a full review of the authorities bearing on the subject. S. C. 56 N. Y. 168. Ante, § 561; §§ 529, 530. It is said by Justice HARLAN, in *New York Cent. & H. R. R. Co. v. Traloff*, 100 U. S. 24, that in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the articles carried under the name of baggage for his personal use and convenience when traveling; and in the absence of conduct on the part of the passenger misleading the carrier as to the value of his baggage, the court cannot as a matter of law declare that the mere failure of the passenger, unasked, to disclose the value of his baggage is a fraud upon the carrier which defeats all right of recovery.

§ 566. Under ordinary circumstances, a general exemption from liability is not construed to exonerate a carrier from losses by negligence or misconduct on the part of himself or his servants.¹ Embodied in a receipt given for the goods, it is to be construed most strictly against the carrier;² and where the language will permit, he is to be held chargeable with losses by negligence, notwithstanding general words of exemption; as that the parcel or goods are carried at the risk of the owner.³ Affirming the right of the carrier, a corporation, as the courts of this State now do, to make an express contract exempting itself from liability for losses occurring through the fault, negligence, or willful act of its servants, agents or officers, other than directors, they do not admit the carrier's right to impose its own terms, nor will they construe any general words of exemption as covering such losses.⁴ But where the contract is fairly made, the carrier is allowed to stipulate for exemption from loss by negligence, and to limit his liability in case of loss to a given sum.⁵

§ 567. The carrier's liability is partly based upon the reward or compensation paid to him for the risk which he assumes; and in respect to parcels, of generally small value, and yet occasionally covering great values, it is but reasonable that he should be permitted to adopt such a mode of receiving them as will limit his liability to a uniform and reasonable sum, or disclose to him the true value of the parcel he receives, and give him a reasonable price for the combined service and risk as-

¹ *Magnin v. Dinsmore*, 56 N. Y. 168; *Oppenheimer v. U. S. Express Co.*, 9 Albany Law Journal, 187; *Stedman v. Western Transp. Co.*, 48 Barb. 97; *Hooper v. Wells, Fargo & Co.*, 5 Am. Law. Reg. (N. S.) 16; *Nicholas v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 370; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *Holsapple v. Rome, W. & O. R. R. Co.*, 86 N. Y. 275; *Kenney v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 422; *Jennings v. Grand Trunk Ry.*, 127 N. Y. 438; *Brewer v. N. Y., etc., R. R. Co.*, 124 N. Y. 59.

² *Guillaume v. Hamburg & Am. Packet Co.*, 42 N. Y. 212.

³ *Westcott v. Fargo*, 6 Lansing, 319; S. C. 61 N. Y. 542; cited with approbation in *Magnin v. Dinsmore*, supra, 56 N. Y. 168, 171; *School District v. B. H. & Erie R. Co.*, 102 Mass. 552; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344, 383; 46 N. Y. 271; *Knell v. U. S. & Brazil Steamship Co.*, 33 N. Y. S. R. (1 Jones & Spencer), 423; *Vroman v. Am. M. Union Ex. Co.*, 5 N. Y. S. C. (T. & C.), 22; ante, § 561.

⁴ *Knell v. U. S. & Brazil S. Co.*, supra; *Brewer v. N. Y., etc., R. R. Co.*, 124 N. Y. 59, 62.

⁵ *Belger v. Dinsmore*, 51 N. Y. 166; *Collender v. Dinsmore*, 55 N. Y. 200; *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76. This is the rule where the rate of freight is based upon the valuation agreed upon. *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239, 245; *Graves v. Lake Shore & Mich. South. R. R. Co.*, 137 Mass. 33; *Louisville & N. R. R. Co. v. Sherroll*, 84 Ala. 178; *Harvey v. Terre Haute, etc., R. R. Co.*, 74 Mo. 538.

sumed by him. On this ground the early decisions gave effect to public notices, published in such manner as to bring them to the knowledge of the shipper; such as notices that the carrier will not hold himself responsible for goods above a given sum, unless the same are entered and paid for in proportion to the risk, or unless the contents of packages are made known and a price paid for their insurance.¹ If a party under such a notice, deliver and pay the freight on a package as containing two hundred pounds, and it contains four hundred and is lost, the carrier is not held liable beyond the amount for which he received compensation; and he should not be, where the transaction is the same in substance, excluding the public notice.²

Being obliged to receive and carry all packages and parcels that are tendered to him, it is but just that the law should accord to the carrier the right and the means of ascertaining the value of the package delivered to him for transportation. It is necessary to his safety now as it ever was;³ and there is perhaps no better mode of securing this information than that now generally used by our express companies; namely, receiving and carrying parcels on a uniform scale of prices, with a stipulation in the receipt given for each, limiting the company's liability to a fixed sum, unless the contents or value of the parcel is disclosed and the freight on it paid according to the distance and risk;⁴ each package being treated as one article or parcel, without opening it or making any examination of its contents.⁵ In this way the shipper puts his own valuation upon the parcel when he delivers it, and is limited to that amount, when after its loss he brings an action to recover its value.⁶

§ 568. It has been repeatedly asserted by eminent jurists, and assumed by others, that the carrier has a right to demand from his employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he

¹ *Clay v. Willan*, 1 H. Bl. 298; *Yates v. Willan*, 2 East, 128; *Izett v. Mountain*, 4 East, 371; *Nicholson v. Willan*, 5 East, 507; 62 N. Y. 35.

² *Tyly v. Morrice*, Carth. 485.

³ *Riley v. Horne*, 2 Moore & Payne, 341; and 5 Bing. 217, decided in November, 1828, about eighteen months before the passage of the act of 1830; 1 William IV. Ch. 68; ante, § 555.

⁴ *Kirkland v. Dinsmore*, 62 N. Y. 171; *Hoadley v. N. Tr. Co.*, 115 Mass. 304; *Boorman v. American Ex. Co.*, 21 Wis. 152; *Southern Ex. Co. v. Purcell*, 37 Ga. 103; 34 Ga. 315; *Meyer v. Harnden's Ex. Co.*, 24 How. Pr. 290.

⁵ *Wetzell v. Dinsmore*, 54 N. Y. 496.

⁶ *Wyld v. Pickford*, 8 Mees. & Welsb. 443; *Bernstein v. Boxendale*, 6 Com. B. (N. S.) 251; *Henderson v. The London & N. W. R. R. Co.* (Law Rep.) 5 Exch. 90; *Boxendale v. Great Eastern R. R. Co.* (Law Rep.), 4 Q. B. 244.

ought to use in discharging his trust.¹ The English statute relating to parcels, assumes this right; and the principle embodied in that act is carried forward into the statute relating to railway and canal carriers, and into the shipping acts.² But it is to be observed that this right to demand information respecting parcels tendered for conveyance, is limited to the reasonable purpose of the inquiry; and that the carrier cannot insist upon the disclosure of the contents of a parcel, as a condition of his receiving it for conveyance.³ And as a rule, general information is all that the carrier can ask for with propriety.

It is not the shipper's legal duty to volunteer a disclosure of the nature or value of the goods or parcels tendered for carriage. The inquiry comes properly from the carrier, under ordinary circumstances. If he wishes to ascertain the extent of the risk assumed by him, he should inquire at the time the goods are delivered; and then if he is not answered truly, he will have a defense.⁴

¹ *Riley v. Horne*, 2 Moore & Payne, 341; 5 Bing. 217, Per BEST, J.; *BRONSON, J.*, in *Hollister v. Nowlen*, 19 Wend. 244. ² Ante, §§ 555, 556, 558, 559, 561-565.

³ *Couch v. London & N. W. R. Co.*, 14 C. B. 255, 291. The court holds that the railway company was, 1, a common carrier from London to Glasgow, *i. e.*, to a point beyond the realm, to which it carried goods; 2, that the company was a common carrier of packed parcels; 3, that a common carrier has no general right to refuse to receive a parcel tendered to him for conveyance, unless informed of the nature of its contents. *JERVIS, C. J.*: "With regard to goods of a peculiar value, or of a particular description, if their value be not disclosed at the time they are delivered to the company, the law provides a remedy; the liability of the company is qualified, and the party sending them is, by reason of the concealment, prevented from recovering the full value of the goods." The carrier, a railway company, has no right to open a parcel to ascertain whether it contains other parcels addressed to different persons. *Couch v. London & N. W. R. Co.*, 2 C. & K. 789; *Simons v. Great Western R. Co.*, 18 C. B. 805, a carrier is not allowed to impose an unreasonable condition; and a condition that he will not be accountable for the loss of any package insufficiently or improperly packed, is unjust and unreasonable. The carrier is liable for a refusal to receive goods, where he insists upon the delivery of them and his receipt of them, under such a condition. *Garton v. Bristol & Ex. R. Co.*, 1 Best & Smith, 112.

⁴ *Brooke v. Pickwick*, 4 Bing. R. 218; *Phillips v. Earle*, 8 Pick. 182. See *New York Cent. & Hudson R. R. Co. v. Fraloff*, 100 U. S. 24. In *Walker v. Jackson*, 10 M. & W. 161, Baron PARKE says: "I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he asks no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a fraud which vitiates the contract altogether. But in this case, if there was a delivery at all of the carriage, with the jewelry in it, it was a delivery to be carried for a reward, namely, five shillings." The jewelry was in the carriage, and

§ 569. Actual notice given by a common carrier to his customer, specifying the terms on which he receives and carries goods, becomes parcel of the contract when it is proved that the property or parcel was delivered upon the terms thus offered.¹ And though it be not made the basis of a contract, it often becomes effective to shield the carrier from liability for things of special and peculiar value, not disclosed at the time of the delivery; for it appears to be agreed that the carrier may in this manner require the shipper to state the nature or value of the property, at the risk of having it received and carried as an article of ordinary value. The carrier does not impose an illegal condition; he asks for reasonable information bearing on the transaction; and the shipper is left free to act on his own direction, accepting the legitimate consequences of his conduct.² By delivering the package or parcel, without giving the information asked for, the shipper leaves it to be carried, if he does not impliedly consent that it shall be carried, in the usual manner; and it may be doubted whether he can refuse all information in regard to it, and compel the carrier to receive a package for conveyance. Under the statute law of England he may do so, and the carrier may limit his liability to a given sum.³

§ 570. *Baggage.* We have seen that carriers of passengers are considered common carriers of their baggage; * and that a passenger can-

the owner did not inform the carrier of the fact; and the carriage was run into the water in landing from a ferryboat.

¹ *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *Hollister v. Nowlen*, 19 Wend. 234; *Kimball v. Rut. & Bur. R. Co.*, 26 Vt. 247; *Farmers & M. Bank v. The Champlain Transp. Co.*, 23 Vt. 186, 205; *Camden & A. R. v. Baldauf*, 16 Penn. St. 67; *Reno v. Hogan*, 12 B. Mon. R. 63; *Buckland v. Express Co.*, 97 Mass. 127; *Fillebrown v. G. T. R. R.*, 55 Maine, 468; *Adams Ex. Co. v. Stettaners*, 61 Illinois, 184; *B. & O. R. R. v. Brady*, 32 Md. 333; *Rawson v. Penn. R. Co.*, 48 N. Y. 212.

² In *Cole v. Goodwin*, 19 Wend. 251, 268, Mr. Justice COWEN reviews the authorities and says: "So long as the printed notice of a common carrier is confined to the purposes which I have enumerated, and others calculated to save himself, without mischief to his customer, or for the benefit of the latter, I see no objection in principle to giving it full effect. So far it is not a refusal to carry for a reasonable reward. So far it is not a limitation of the carrier's liability. He merely declares to the customer what is true and just: 'you know the value of your goods; I will not rummage your parcel; I will take your own account; but I will not incur the responsibility of a common carrier unless your account shall prove true. If you commit a fraud or deal capriciously or capriciously on your own part, you cannot complain if my duty is reduced to that of a mandatary.'" See cases there cited, and *Wyld v. Pickford*, 8 M. & W. 443.

³ Ante, § 530.

⁴ Ante, §§ 502, 503, 504, 498. In this State the fare which a railroad corporation is authorized to collect for the transportation of a passenger includes the transportation of his baggage not exceeding one hundred and fifty pounds in weight. Laws of 1892, Chap. 676, § 37. See *Isaacson v. N. Y. C. & H. R. R. R. Co.*, 94 N. Y. 278.

not charge a carrier with liability for merchandise, money or other valuable things packed with and not being a legitimate part of a traveler's luggage.¹

The passenger's baggage must be delivered into the custody of the carrier, in order to charge him with its safe conveyance. Nothing can be more reasonable. If a passenger choose to keep a parcel, an overcoat or a traveling bag or watch in his own custody, there is no reason or justice in holding the carrier responsible for its safety.² Under many circumstances his custody of the parcel exposes it to dangers from which it would be free in the hands of the carrier. If a passenger on a ferryboat retains a parcel in his hand, he does not expect the carrier to guard it from the chance of loss by theft; and he does not when he takes passage on a steamboat or in an ordinary railway car; and since he does not entrust it with the carrier, he cannot hold him chargeable with its safety, from losses arising from the presence of strangers whom he cannot exclude from the conveyance. And yet the carrier may be liable for the loss of such a parcel arising from the negligence of his servant, when it is placed in the car or handled by him at the end of the journey.³

§ 571. Baggage, like other goods, is to be duly delivered to the carrier; it is to be placed within his custody in the usual and ordinary manner. Under a statute of this State, prescribing the mode in which railroad corporations shall transact their business, a check must be affixed to each parcel of baggage delivered for transportation, and a duplicate thereof given to the owner or person delivering it; if such check is refused on demand the corporation is required to pay to the passenger ten dollars and can collect no fare from him, or if the fare has been paid, the conductor in charge of the train must refund it to him. Such baggage must be delivered without unnecessary delay to the passenger or any

¹ Ante, §§ 529, 530; *C. & C. Air Line R. R. Co. v. Marcus*, 38 Ill. 220.

² *Tower v. Utica & S. R. R. Co.*, 7 Hill, 47; *Blanchard v. Isaacs*, 3 Barb. 388; *Steamboat v. Vanderpool*, 16 B. Monroe, 302; *Clark v. Burns*, 118 Mass. 275; *Pulman Palace Car Co. v. Pollock*, 69 Texas, 120; *Carpenter v. N. Y., N. H., & H. R. R. Co.*, 124 N. Y. 53.

³ *Le Conteur v. London & S. W. R. Co.*, 12 Jur. N. S., 266; *L. R. 1 Q. B. 54*; *S. C. 6 B. & S.*, 961. The court in this case, involving a chronometer, hold that the circumstances must be very strong to show an intention, on the part of a passenger, to relieve the company from their ordinary liability to carry safely. In *Butcher v. London & South Western R. Co.* (16 Com. Bench, 13), a porter of the company took from a passenger, as usual, a carpet bag (which contained a large sum of money) for the purpose of securing a cab; and having secured the cab within the station, placed the bag in it, and returned for other baggage belonging to the passenger; the cab disappeared; and the company was held liable for the loss.

person acting in his behalf at the place to which it was to be transported, where the cars usually stop, or at any other regular intermediate stopping place, upon notice to the baggage-master in charge of baggage on the train of not less than thirty minutes upon presentation of such duplicate check to the officer or agent of the railroad corporation or of any corporation over any portion of whose road it was transported.¹

Having the right to prescribe reasonable regulations, it is quite evident that railroad carriers may in this State insist that all baggage shall be delivered at the proper place of receiving it, a reasonable time before the train is to leave; and that each parcel of baggage shall be properly checked: that they may adopt a rule to check his baggage, on the passenger's showing his ticket; and to exchange tickets with connecting roads. Courts will enforce and give effect to these, and like rules, for the protection of both parties.²

In the first place, a passenger's baggage must be checked by the person having authority to receive and check it; ³ and his authority may be proved by showing that he was accustomed to receive and check baggage, with the knowledge of the company. A failure to give a check, on request, when the baggage is delivered to the agents charged with receiving it, will not affect a passenger's rights.⁴ The carrier cannot shield himself under his rule, that he will not be liable for baggage unless it is checked, where the parcel is received and no check given because the authorized agent is not there. After his agents receive it, the carrier's liability commences; quite frequently this happens some hours before the transit or journey commences.⁵

When baggage is left in the rooms appropriated to its reception, to be afterward checked when its owner is ready to proceed on his way, the corporation does not receive it as a common carrier; they receive it in the line of their business, as they retain baggage not called for within a reasonable time at the end of their road, and are liable for it on principle as bailees for hire.⁶

¹ Laws of 1892, Chap. 676, § 45.

² Ill. Central R. Co. v. Copeland, 24 Ill., 332; a railroad cannot refuse to label or check baggage, and so compel a passenger to keep it in his personal care. Munster v. South E. R. Co., 4 C. B. (N. S.) 676; Davis v. M. S. & N. J. R. Co., 22 Ill. 278.

³ Mich. So. & Northern Ind. R. Co. v. Myers, 21 Ill. 627; Butler v. Hudson River R. Co., 3 E. D. Smith, 571.

⁴ Freeman v. Newton, 3 E. D. Smith, 246, 251.

⁵ Hickox v. Naugatuck R. Co., 31 Conn. R. 281; Wood v. Devin, 13 Ill., 746.

⁶ Ante, §§ 336, 337, 538; O'Neil v. N. Y. C. & H. R. R. R. Co., 60 N. Y. 138. If, however, the baggage is delivered to the carrier for transportation and not for storage, and the passenger consents to some delay for the convenience of the carrier, the latter is liable as carrier for the loss of the baggage. Shaw v. Northern Pacific R. R. Co., 40 Minn.

When a passenger takes a stateroom on a steamboat and carries into it items of baggage and other valuables, his relation to the carrier is similar to that of a guest to an innkeeper, after he has taken a room and placed his baggage in it; and the carrier's liability is like that of the innkeeper. The act of taking the key to a room in the inn, does not charge a guest with the custody of his baggage in the room, so as to discharge the innkeeper: and the same is adjudged where a passenger on a steamboat receives the key to a room where he places his baggage, without intending to retain the custody of his baggage to the exclusion of the carrier. The key gives the passenger access to his baggage and a supervision of it; it obliges him to take some care of it; but it does not take from the master the custody and possession of the vessel, in-

144. In *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548; the railroad company carried the passenger and his trunk from Dunkirk to Buffalo, the trunk being checked and the train arriving about ten o'clock in the evening, a cold winter's night. On his arrival, the passenger went directly to the house of a friend, retaining his check; and it appears that the company delivered, as usual, all the baggage called for that evening. During the night the depot was burned, with the baggage; and it was held that the company were not liable. In *Powell v. Myers*, 26 Wend. 591, a passenger arriving at New York about the same time in the evening by a steamboat, left his baggage on board till morning, with the consent of the captain; and it was lost by a delivery on a forged order. Leaving the goods in the depot over night with the carrier's consent, where the owner or his agent has an opportunity to take them away in the evening, relieves the company from the liability of an insurer. *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 595; *Watkins v. N. Y. C. & H. R. R. Co.*, 16 State Rep. 592. The liability of a railroad company as carrier terminates on the expiration of a reasonable time for the removal of the baggage after the arrival of the train at the place of destination. *Chicago, etc., R. R. Co. v. Boyce*, 73 Ill. 510; *Chicago, etc., R. R. Co. v. Addizoat*, 17 Ill. App. 632. The railroad company remains responsible for baggage as carrier, until the passenger has a reasonable time and opportunity to remove it, over-night, where that is necessary. *Dinenny v. N. Y. & N. H. R. R. Co.*, 49 N. Y. 546. See *Norway P. Co. v. B. & M. R. R. Co.*, 1 Gray, 263, and a special arrangement to keep for some days not authorized by the company; *Mattison v. N. Y. C. R. R. Co.*, 57 N. Y. 552; 76 N. Y. 381. *Oderkirk v. Fargo*, 58 Hun, 347. If a passenger on a steamboat takes a stop-over check at an intermediate station, leaving his baggage on board to be carried to its destination he cannot recover its value, if while awaiting his arrival, it is destroyed, without fault of the carrier, by the burning of the warehouse at the place for delivery. *Laffrey v. Grummond*, 74 Mich. 186.

The carrier's liability for baggage ceases after it comes to the place of destination and the same is stored in a safe and secure warehouse. His liability as carrier does not cease, by his placing the baggage in an insecure room from which it is stolen—a room without blinds accessible from without. *Bartholomew v. St. Louis, J. & C. R. Co.*, 53 Ill. 227, A. D. 1870; *Chicago, Rock I. & P. R. R. Co. v. Fairclough*, 52 Ill. 106. A passenger may recover against the contracting carrier for the unexplained failure of the connecting road to deliver his baggage at the place of his destination. *Burnell v. N. Y. Central R. R. Co.*, 45 N. Y. 184; see *Green v. N. Y. C. R. Co.*, 12 Abbott's Pr. (N. S.) 473.

cluding the room given to the traveler for his special accommodation.¹ Can the same rule be applied where a passenger secures accommodations in a sleeping or Pullman palace car, in charge of a porter whose business it is to make up the beds at night and wait upon the passengers? A divided court answers the question in the negative, on the implied understanding of the traveling public.² A carrier does not undertake to carry and safely deliver the effects of travelers not delivered into his custody; and money or other property retained in the possession of the passenger by day and placed in his berth at night is not in the custody of a corporation which carries and furnishes travelers with berths in sleeping coaches.³ But though such corporations are not insurers of property taken by the passenger into his berth at night, they are bound to exercise a degree of care commensurate with the danger to which the passenger is exposed to protect him from robbery while sleeping;⁴ and where a railroad corporation contracts with a parlor or sleeping car company to haul the cars of the latter over its road, it is liable in the same way and to the same extent as if such cars were owned by it.⁵

In a situation somewhat different and yet having some analogous features, namely, where a person takes passage on a steamer, among the steerage passengers, and retains his trunk and fastens it under his berth, the carrier, not being entrusted with the property, is not charged with its safe keeping.⁶ The carrier has the right to appoint the place of deposit, and may refuse to become responsible for goods or baggage unless it be properly stored.⁷

§ 572. A railroad company selling through tickets over its own and other roads forming a continuous line, and checking baggage through, is liable for it at the point of destination. The company contracts to carry the passenger with his baggage to the place for which he purchases a ticket, and agrees that the baggage shall be delivered on presentation

¹ *Mudgett v. Bay State Steamboat Co.*, 1 Daly, 151. Here the passenger's valise was stolen out of his room, properly locked. A notice posted in the steamboat that a passenger must bear a loss by theft from his room is unreasonable. *Macklin v. New Jersey Steamboat Co.*, 7 Abbott's Pr. (N. S.) 229; *Core v. Norwich & N. Y. Tr. Co.*, 2 Daly, 254; 21 N. Y. 111.

² *Welch v. Pullman Palace Car Co.*, 16 Abbott's Pr. (N. S.) 352.

³ *Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267; *Carpenter v. N. Y. N. & H. R. R. Co.*, 124 N. Y. 453.

⁴ *Pullman Car Co. v. Gardner*, 3 Pennypacker, 78; *Carpenter v. N. Y., N. H. & H. R. R. Co.*, 124 N. Y. 53; *Pullman Palace Car Co. v. Matthews*, 74 Texas, 654.

⁵ *Laws of 1892*, Chap. 676, § 41.

⁶ *Cohen v. Frost*, 2 Duer, 335; see *Tolano v. National S. Nav. Co.*, 5 Robt. (N. Y. S. Ct.) 318.

⁷ *Van Horn v. Kermit*, 4 E. D. Smith, 453.

of the check for it.¹ The corporation has the power to make a contract to carry and deliver at a point beyond the termination of its road; and it may do this where it sells separate tickets issued by the several companies constituting the entire line. The contract may be established by proving the circumstances; the tickets being regarded as receipts or tokens, do not legally prove a succession of contracts; they are consistent with a single contract for the entire route.²

Are the other companies in the line also liable on the contract? It is quite clear that they are, when they act through the same agents; *e. g.*, where three separate railroad companies owning distinct portions of a continuous railroad between two termini, run their cars over the whole road, employing the same agents to sell passage tickets and receive baggage to be carried over the entire road; the last company is liable for the baggage received by the first.³ Two principles must be affirmed, in order to maintain this rule of liability by each of the roads uniting to form a continuous line of conveyance and transportation: 1. That several railroad companies may so unite in the carrying on of their business as that each shall become carriers and responsible as such over the roads of the other companies, and beyond their own proper terminus; and 2. That a railroad company may become liable upon the contracts of its agents, and by the receipt of freight and baggage at the terminus of the continuous line farthest from its own line.⁴

Roads thus forming a continuous line and carrying goods and passengers on an agreement for a division of the fare or freight received on goods or from passengers carried over the several roads, do not become partners, as between themselves or in respect to third persons. On a through contract, the company delivering the goods is entitled to recover

¹ *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184; *Carey v. Cleveland & Toledo R. R. Co.*, 29 Barb. 35; *Muschamp v. Lancaster & Preston J. R. Co.*, 8 M. & W. 421; *Norway P. Co. v. Boston & M. R. R. Co.*, 1 Gray, 263; *Ill. Central R. R. Co. v. Copeland*, 24 Ill. 332; *Weed v. S. & S. R. Co.*, 19 Wend. 534.

² *Quimby v. Vanderbilt*, 17 N. Y. 306; 8 N. Y. 37; *Weed v. Saratoga & S. R. R. Co.*, 19 Wend. 534. The power to make a through contract is generally affirmed. *Railroad Co. v. Pratt*, 22 Wallace, 123; *Hill Manuf. Co. v. Boston & L. R. Co.*, 104 Mass. 122; *Feital v. Middlesex R.*, 109 Mass. 398; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206.

³ *Hart v. Rensselaer & Saratoga R. R. Co.*, 8 N. Y. (4 Seld.), 37; *McCormick v. Hudson R. R. Co.*, 4 E. D. Smith, 181.

⁴ *Carey v. Cleveland & Toledo R. R. Co.*, 29 Barb. 35. Judge ALLEN reviews in this case the decisions, and affirms the propositions cited in the text. *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184; *Schroeder v. Hudson River R. R. Co.*, 5 Duer, 55; *Bissell v. Michigan S. & N. Indiana R. Cos.*, 22 N. Y. 258, and cases there cited; *Buffett v. T. & B. R. R. Co.*, 40 N. Y. 168, and note on page 179; 42 Vt. 566.

the freight earned on the several lines.¹ And where roads connect but do not form a continuous line, the practice of each to sell through tickets and check baggage over both roads, imports an agency by the company selling the tickets, and not a contract by the company for the whole route.²

§ 573. In this State a statute takes notice of the relation existing between connecting railroads, allows one company to receive and contract for the delivery of freight at any point on the continuous line within or beyond the State, renders the company liable on the contract, and gives it a remedy against the company through whose neglect or default the goods are injured or destroyed.³ The statute does not apply where the company first receiving the goods does not undertake to carry them to

¹ *Merrick v. Gordon*, 20 N. Y. 93; 5 Lans. 482; 2 E. D. Smith, 187; 18 Wend. 329; 7 Hill, 292. In *Bostwick v. Champion* (11 Wend. 571), three lines of stages united to form a continuous line from Utica to Rochester, on an agreement by which the route was divided into three sections, each line to be run by a party furnishing his own carriages, horses and drivers at his own expense, and the fare received from passengers after deducting tolls paid at turnpike gates, was to be divided between the three lines in proportion to the number of miles run by each; and an injury having been caused to a stranger by the driver on one of the lines, it was held that the stranger might maintain a joint action on the case against the owners of the three lines, without affirming that these owners were partners, as among themselves. S. C. 18 Wend. 175. In *Fairchild v. Slocum* (19 Wend. 329), the owners of canal boats on the Erie Canal formed an association with the owners of vessels on Lake Ontario, for the transportation of goods from the city of New York to Ogdensburg on the St. Lawrence and other places; and all the parties were held liable for a loss on the lake, though some of the parties had no interest in the vessel that was lost. S. C. 7 Hill, 292.

Railroads uniting to form a continuous line and dividing receipts in proportion to the distance covered by each road, are not regarded as partners; *v. g.*, where the roads appoint an agent to sell through tickets and for intermediate places, and the proceeds are divided among the several companies each month, according to the respective amounts of their established rates of fare. *Straiton v. N. Y. & N. H. R. Co.*, 2 E. D. Smith, 184; *Ætna Ins. Co. v. Wheeler*, 5 Lans. 480, 482; S. C. 49 N. Y. 616. The question was fairly presented and passed upon by the Court of Appeals, in the case above cited; *Merrick v. Gordon*, 20 N. Y. 93; where a firm of carriers upon the canals agree with a firm of carriers upon the Great Lakes for a division in fixed proportions of the total freight received for the carriage of goods over the united routes or portions thereof. The opinion distinguishes this case from that of *Champion v. Bostwick*, where the whole earnings were divided in proportion to distance, the receipts from passengers traveling over only one route, as well as from those traveling over the three united. The distinction is quite clear, if not very broad.

² *Milnor v. New York & N. H. R. R. Co.*, 53 N. Y. 363.

³ Laws of 1892, Chap. 676, § 48; *Burtis v. Buffalo & State Line R. Co.*, 24 N. Y. 269. The contract is valid independent of the statute; at least the carrier is liable. *Buffett v. Troy & Boston R. R. Co.*, 40 N. Y. 168; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438.

their final destination; ¹ and it does not assume to render the second or third company forming the continuous line, liable to the owner for damages arising to the goods while in the hands of the first or a prior carrier. As construed, the statute is in one sense declaratory of the common law, and leaves the intermediate carrier liable only as an ordinary carrier for loss or damage arising while the goods are in his possession.² If the first carrier makes a contract for the entire route, he is not allowed to escape his liability on the ground that a connecting carrier fails in his duty, and delays the transportation.³ The rights of the parties are fixed by the contract; and it is held that a connecting carrier receiving goods from the contracting carrier, under a through contract, is entitled to the exemption stipulated for in the contract, as from loss by fire. The last and the intermediate carriers are regarded as allies, aiding the contracting carrier in the fulfillment of his contract.⁴

Under a through contract by the first carrier, the intermediate carrier is not on principle liable on the contract; and is chargeable as a carrier by virtue of his occupation. Hence where a passenger purchases a ticket entitling him to ride over different lines of road, each road is liable for a loss of his baggage while in its possession; and the passenger not suing on the contract, cannot recover for a loss of his baggage against the last road where it is shown that it did not come into its custody.⁵

A contracting carrier, held liable for a loss of goods under a through contract, has his remedy over against the connecting line or road by whose neglect or default the loss occurred.⁶ In the absence of a through contract, no such liability can arise; one carrier not being liable, *prima facie*, for a loss of goods occurring while they are in the hands of another carrier.⁷

¹ Root v. The Great Western R. R. Co., 45 N. Y. 524.

² Smith v. N. Y. Central R. R. Co., 43 Barb. 225. A contrary opinion is expressed by the General Term in Root v. Great Western R. R. Co., 2 Lansing, 199; S. C. reversed as above cited, 45 N. Y. 524.

³ Condict v. Grand Trunk R. Co., 54 N. Y. 500; Beard v. St. Louis, etc., R. R. Co., 79 Iowa, 527; Washington v. Raleigh & G. R. R. Co., 101 N. C. 239; Halliday v. St. Louis, etc., Ry. Co., 74 Mo. 159; Clyde v. Hubbard, 88 Pa. St. 358; Newell v. Smith, 49 Vt. 255.

⁴ Maghee v. Camden & Amboy R. R. Co., 45 N. Y. 514; Manhattan Oil Co. v. Camden & Amboy R. & Tr. Co., 54 N. Y. 197. See Irwin v. N. Y. C. R. Co., 1 T. & C. 473; S. C. 59 N. Y. 653; Faulkner v. Hart, 82 N. Y. 413, 422; Kiff v. Atchison, etc., R. R. Co., 32 Kansas, 263. The rule applies only under a through contract; *Ætna Ins. Co. v. Wheeler*, 5 Lans. 480; S. C. 49 N. Y. 616.

⁵ Chicago & Rock Island R. Co. v. Fahey, 42 Ill. 81. In Condict v. Grand Trunk R. Co., the action was on the contract—a special contract for the transportation of the goods to Chicago—54 N. Y. 500. See *Anchor Line v. Dater*, 68 Ill. 369.

⁶ Chicago & N. R. Co. v. Northern Line Packet, 70 Ill. 217.

⁷ C., H. & D., & D. & M. R. Co. v. Pontius & Richmond, 19 Ohio St. 221.

§ 574. A check for baggage is a kind of receipt; it is like a ticket given to a passenger as an evidence of his right to a place in the conveyance. A ticket is evidence that a passenger has paid his fare, and where on its face it entitles the holder to travel over several lines of road, a recognition of the ticket by one of the roads as valid, is proof that the company is liable for the passenger's baggage.¹ The check is given for the purpose of relieving the passengers from all care and supervision of his baggage while on the journey; and where it is the custom of a road to check baggage on the passenger's showing his ticket, the check is *prima facie* evidence of a delivery of the baggage and that the party receiving it was a passenger.² The possession of a ticket is also presumptive evidence that the holder has paid the regular fare on the route on the day of its date.³

The non-delivery of baggage at the end of the journey, when called for *prima facie* proves a loss of the same by the carrier's negligence.⁴ Circumstances, like the passenger's lameness, may excuse delay in calling for baggage.⁵

§ 575. From an early day carriers have been accustomed to make regulations limiting the amount and weight of baggage to be carried with a passenger;⁶ and while the custom does not appear to be general in respect to the conveyance of passengers by land, it appears to be well settled that a carrier may adopt a tariff of prices, under which he charges a passenger without baggage a specific sum, a passenger with baggage worth a hundred dollars an additional amount, a passenger with baggage worth five hundred dollars a further sum, and so on, increasing the charge with the increase in the risk and expense of the transportation; taking care that the charges be justly and reasonably proportioned to the risk assumed and service rendered.⁷ It appears that steamers carrying passengers to Europe, make an agreement limiting the space to be occupied, as well as the value of the baggage, for

¹ Chicago & R. I. R. Co. v. Fahey, 52 Ill. 81; Merrill v. Grinnell, 30 N. Y. 594.

² Davis v. M. S. & Ind. R. Co., 22 Ill. 278; Ill. Central R. Co. v. Copeland, 24 Ill. 332; Davis v. Cayuga & Susq. R. R. Co., 10 How. Pr. 330; Earle v. Cadmus, 2 Daly, 237.

³ Pier v. Finch, 24 Barb. 514.

⁴ Burnell v. N. Y. C. R. R. Co., 45 N. Y. 184; Fairfax v. N. Y. C. & H. R. R. Co., 67 N. Y. 11; Stewart v. Stone, 127 N. Y. 506; Canfield v. Baltimore & O. R. R. Co., 93 N. Y. 532; Claffin v. Meyer, 75 N. Y. 260.

⁵ Curtis v. Avon, etc., R. R. Co., 49 Barb. 148; 49 N. Y. 546.

⁶ Middletown v. Fowler, 1 Salk. 282; Upshore v. Aidee, 1 Comyns, 25.

⁷ Nevins v. Bay State Steamboat Co., 4 Bosw. 225; Berley v. Newton, 10 How. Pr. 490. See McCormack v. Penn. C. R. R. Co., 49 N. Y. 303; Williams v. Great W. R. Co., 10 Exch. 15.

which the owners become liable; and that agreements of this kind are upheld.¹

The general rule applies: the carrier is entitled to know the general nature and value of the property he is asked to take charge of; but where the carrier demands and receives compensation as freight for the transportation of packages containing merchandise and baggage, and there are no circumstances of fraud or concealment on the part of the passenger, the carrier must answer for the merchandise as well as the baggage.² And where he sets up a limitation of his liability, he must establish the contract affirmatively; since the law will not imply a contract from a notice on a check or card given for baggage.³

§ 576. There being no special agreement relating to a passenger's baggage, his fare or the price paid by him for a ticket, includes the transportation of his baggage.⁴ The contract covers his baggage⁵—those articles of wearing apparel and personal comfort and convenience which are usually or occasionally carried by passenger as baggage.⁶ The contract to carry the ordinary baggage of a passenger is implied from the usual course of business; and the carrier's obligation is to receive and carry the baggage in the same conveyance or train, and deliver it to the passenger at the place of destination in the usual manner.⁷ Outside of any special agreement, the carriage of baggage is incident to the carriage of a passenger; and in the absence of the principal contract for the conveyance of the passenger, *i. e.*, where he goes by another and parallel route, the carrier is not chargeable as such with his baggage.⁸

A servant traveling with, and on a ticket paid for by his master, may maintain an action in his own name against a railway company for the

¹ Steers v. Liverpool, N. Y. & P. Steamship Co., 57 N. Y. 1; 51 N. Y. 166.

² Stoneman v. Erie Railway Co., 52 N. Y. 429; Buchanan v. Turner, 26 Md. 1; Hannibal Railroad v. Swift, 13 Wallace, 262; Sloman v. Great Western Ry. Co., 67 N. Y. 208; Millard v. Missouri, K. & T. R. R. Co., 86 N. Y. 441.

³ Prentice v. Decker, 49 Barb. 21; 4 Bosw. 225; 19 Wend. 270.

⁴ Chicago & Rock Island R. R. Co. v. Fahey, 51 Ill. 81; Isaacson v. N. Y. C. & H. R. R. Co., 94 N. Y. 278.

⁵ Powell v. Meyers, 26 Wend. 591.

⁶ Orange Co. Bank v. Brown, 9 Wend. 85; Merrill v. Grinnell, 30 N. Y. 594; Dexter v. Syracuse, etc., R. R. Co., 42 N. Y. 326; Hawkins v. Hoffman, 6 Hill, 586; Pardee v. Drew, 25 Wend. 459; Ouimit v. Henshaw, 35 Vt. 604.

⁷ Glaco v. N. Y. C. R. R. Co., 36 Barb. 557; Jones v. Norwich & N. Y. Tr. Co., 50 Barb. 193; Collins v. Boston & M. R. R. Co., 10 Cush. 506.

⁸ Fairfax v. N. Y. C. & H. River R. R. Co., 5 Jones and Spencer, 516; Wilson v. Grand Trunk R. Co., 56 Maine, 60. See 67 N. Y. 11; and see Curtis v. Del., L. & W. R. R. Co., 74 N. Y. 116, 122.

loss of his baggage ; he is not obliged to sue upon the contract, and it is not material who pays his fare.¹ If the plaintiff brings his action on the contract, he must prove a contract with himself ;² and when he brings an action on the case, charging the carrier on the ground of his common law liability, it is sufficient to establish plaintiff's title to the goods, and that they were placed in the defendant's custody by the plaintiff's daughter, servant, son or agent as a passenger.³

§ 577. A railroad company running in connection with others and forming a through line, may contract to carry freight for the entire distance ; and the contract stipulating for exemption from liability as an insurer, will enure to the benefit of the connecting roads.⁴ The contract may be proved by the bill of lading, or it may be established by other evidence ;⁵ it is not established by showing a delivery of the goods marked or addressed to a party at the termination of the route. The law does not in this country imply a contract by the carrier, from the receipt of goods thus marked, to carry them beyond the terminus of his line ; at which point he becomes a forwarder, bound to send them forward according to his instructions, or in the usual manner.⁶ And the rule is not changed where the freight for the entire distance is paid in advance, to be afterwards divided with a connecting line of boats by which the transportation is to be completed.⁷

An important railroad carrier uses this form, in receipting goods for transportation : "Goods or property consigned to any place off the com-

¹ *Marshall v. York, N. & B. R. Co.*, 11 C. B. 655; *Van Horn v. Kermit*, 4 E. D. Smith, 453, 456. See *Porter v. N. Y., L. E. & W. R. R. Co.*, 59 Hun, 177; *Flaherty v. Greenman*, 7 Daly, 481; *Blair v. Erie Ry. Co.*, 66 N. Y. 313.

² *Weed v. Saratoga R. R. Co.*, 19 Wend. 534; *Beecher v. Great Eastern R. Co.*, 18 Weekly R. 627; proof of contract; *Baltimore S. P. Co. v. Smith*, 23 Md. 402. See *Flint & Pere Marquette Ry. Co. v. Wier*, 37 Mich. 111.

³ *Grant v. Newton*, 1 E. D. Smith, 95; *Piper v. Manny*, 21 Wend. 282; *Baltimore S. P. Co. v. Smith*, 23 Md. 402.

⁴ *Railroad Co. v. Androscoggin Mills*, 22 Wallace, 594; *Railroad Co. v. Pratt*, 22 Wallace, 123; *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514; *Manhattan Oil Co. v. Camden & Amboy R. & Tr. Co.*, 54 N. Y. 197; *C. & A. R. & Tr. Co. v. Forsythe*, 61 Penn. St. 81. And see *Whitworth v. Erie Ry. Co.*, 87 N. Y. 413; *St. Louis, Iron Mountain & S. R. R. Co. v. Weakley*, 50 Ark. 397.

⁵ It was proved by the bill of lading in *Railroad Co. v. Androscoggin Mills*, supra; and in *Railroad Co. v. Pratt*, supra, by the way-bill and other circumstances. See also *Root v. Great Western R. Co.*, 45 N. Y. 524; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438, 446; *Berg v. Narragansett Steamship Co.*, 5 Daly, 394.

⁶ *Van Santvoord v. St. John*, 6 Hill, 158, 161; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Babcock v. L. S. & M. S. R. Co.*, 49 N. Y. 491; *Hinckley v. N. Y. C. & Hudson River R. R. Co.*, 56 N. Y. 429; *Hunter v. Southern Pacific R. R. Co.*, 76 Texas, 195.

⁷ *Washburn & M. M. Co. v. Providence & W. R. Co.*, 113 Mass. 490.

pany's line of road, or to any point or place beyond its termini, will be sent forward with as reasonable dispatch as the general business of the corporation, at its warehouse within mentioned, will admit, by a carrier or freight-man, when there are such known to the station agent at said warehouse willing to receive the same, unconditionally, for transportation; the company acting for the purpose of delivery to such carrier or freight-man, as the agents of the consignor or consignee, and not as carriers. The company will not be liable or responsible for any loss, damage or injury to property, after the same shall have been sent from said warehouse of the company, or tendered to such carrier or freight-man for such transportation." Under this agreement it is the right and the duty of the carrier to send forward the goods from the termination of the road, according to the terms of the contract.¹

§ 578. A similar contract is held valid in England, and is quite essential there to protect a carrier from the operation of the rule upheld by the English courts,² namely, that a railway company receiving goods marked for a particular place, undertakes *prima facie* to carry them to their destination; that the rule applies when the goods are directed to points beyond the terminus of the route of the carrier receiving the goods, and even when directed to points beyond the limits of England; and that the contract is exclusively with the first company, so as to leave the owner no right of action against any of the subsequent companies on the route.³ A rule so comprehensive could not be enforced in this country, without compelling the first carrier, in some cases, to answer for the conduct of a great many companies.

§ 579. The growing custom of our railroads to unite in forming extensive lines of transportation, running the same train of cars over several roads, must be considered with the law bearing on the relations thus formed. When the arrangement between the companies provides for the giving of through bills of lading and charging a sum total as freight over the entire line, to be divided between the companies, each may be charged as a carrier on the contract for the transportation of through freight; on the ground of the authority given by each company under

¹ *Hinckley v. N. Y. C. & Hudson River R. R. Co.*, 56 N. Y. 429. The stipulation cited authorizes the company to forward in the usual course of business by any responsible carrier; and the contract cannot be varied in this respect by proof of a simultaneous direction to forward by rail.

² *Fowles v. Great Western R. Co.*, 7 Exch. 699; 7 Railw. Cas. 421.

³ *Muschamp v. Lancaster & Preston Railw.*, 8 M. & W. 421; *Watson v. Ambergate, N. & B. R.*, 3 Eng. Law & Eq. 497; *Scothorn v. S. Staffordshire Railw.*, 8 Exch. 341; *S. C.* 18 Eng. L. & Eq. 553; *Wilson v. York, N. & B. Railw.*, 18 Eng. L. & Eq. 557; *Crouch v. London & N. Railw.*, 14 C. B. 255; *S. C.* 25 Eng. L. & Eq. 287; *Bristol & Ex. v. Collins*, 7 Ho. Lds. Cas. 194; *Coxon v. Great Western R. Co.*, 5 H. & N. 274.

the arrangement.¹ The contract being made on the authority of the several companies, it has been urged that they should be held jointly liable on it; and although the arrangement does not constitute a partnership, it may easily be so framed as to authorize the making of joint contracts on behalf of the connecting roads.²

§ 580. *Prima facie* the delivery of a package or parcel of goods to a common carrier addressed to a consignee at a point on a lateral route branching off from the first line, implies a direction to have the package stopped at the point of separation and sent forward by the usual carrier on the lateral route.³ A similar presumption arises from a delivery of goods to a carrier, addressed to a point beyond the termination of his route, with a special address to the care of a person acting as the carrier's agent at the terminus. The address authorizes the agent to receive and send forward the goods; ⁴ by itself the address to the care of the agent at the point of new departure may indicate that the goods are to pass into the hands of the agent's principal. The circumstances may be considered to ascertain the meaning of the special address.⁵ Addressed to a succeeding carrier or to his agent, the meaning is that the goods are to be transferred to the carrier named; so that when they come into his custody, he receives them as a common carrier.⁶ And when the address specifies a succession of lines or roads by which the goods are to go forward to their place of destination, each carrier must deliver to the next without delay and without departing from his instruc-

¹ *Cin., Ham. & Day. R. v. Spratt*, 2 Duvall, 4; ante, §§ 572, 573; *Hill Man. Co. v. Boston & Lowell R. R.*, 104 Mass. 122.

² In *Gass v. N. Y. Providence & B. R. Co.* (99 Mass. 220), three carriers united to form a through route and carry freight over it for one entire charge to be divided between the three companies; and the court held that the arrangement did not create a partnership or joint liability. *Wilbert v. N. Y. & Erie R. Co.*, 12 N. Y. 245; *Barter v. Wheeler*, 49 N. H. 9. That corporations may become joint carriers, see *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 216; *Aigen v. Boston & M. R. R. Co.*, 132 Mass. 423; *Block v. Fitchburg R. R. Co.*, 139 Mass. 308; *Hot Springs R. R. Co. v. Trippe*, 42 Ark. 465; *Ins. Co. v. R. R. Co.*, 104 U. S. 146; *Barter v. Wheeler*, 49 N. H. 9; *Wylde v. Northern R. R. Co.*, 53 N. Y. 156.

³ *Russell & Annis v. Livingston & Wells*, 16 N. Y. 515; *Van Santvoord v. St. John*, 25 Wend. 660; *S. C. 6 Hill*, 157.

⁴ *Bristol v. R. & S. R. Co.*, 9 Barb. 158. An agent for the delivering carrier does not, instantly on their arrival, become the agent of the owner of the goods. 16 N. Y. 515; *Fitzsimmons v. Southern Ex. Co.*, 40 Ga. 330; *Ela v. Am. Merchants' Union Ex. Co.*, 29 Wis. 611.

⁵ *Rogers v. Wheeler*, 6 Lansing, 420; *S. C. 52 N. Y. 262*.

⁶ *Ladue v. Griffith*, 25 N. Y. 364; *Lamb v. Camden & Amboy R. & Tr. Co.*, 2 Daly, 454, 490; *Rogers v. Wheeler*, supra.

tions; ¹ and in the usual manner; ² and with suitable directions.³ He is bound to use reasonable care and attention in reading the address found upon the goods.⁴

§ 581. On a carrier's receiving goods marked for a point beyond the terminus of his road or line, his implied contract is to carry them over his road or line and transfer them to the next carrier in the due and usual course of business.⁵ We find in a few cases some disposition to infer a through contract from rather slight circumstances; and on the other hand a decided current of authority raising no presumption either way.⁶ Considering the general course of business, and the frequent changes made, and combinations entered into, for the transportation of freight, it is hardly reasonable to imply a presumption in favor of one, rather than another form of contract. An agreement to carry and deliver to the next carrier, in a continuous and connected line, binds according to its terms; ⁷ the carrier fulfills his contract by carrying and delivering the goods according to his agreement.⁸ And the contract is the same in substance, where a carrier receives goods marked for a point beyond his line and engages to forward them from the terminus of his

¹ McDonald v. Western R. Cor., 34 N. Y. 497; Briggs v. N. Y. Central, 28 Barb. 515; Johnson v. N. Y. C. R. Co., 33 N. Y. 610.

² Mills v. Michigan Central R., 45 N. Y. 622.

³ Hempstead v. N. Y. Central R. R., 28 Barb. 485; 33 N. Y. 610.

⁴ Sherman v. Hudson R. R. Co., 5 Daly, 521.

⁵ Rawson v. Holland, 59 N. Y. 611; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438.

⁶ These cases favor the presumption of a through contract: Converse v. Norwich & N. Y. Tr. Co., 33 Ct. 166; Peet v. Chicago & N. R., 19 Wis. 118; Nashua Lock Co. v. Worcester & N. R. R. Co., 48 N. H. 339; Krender v. Woolcott, 1 Hilton, 223; Lamb v. Camden & Am. R. & Tr. Co., 2 Daly, 454, 481; Foy v. Troy & B. R. R. Co., 24 Barb. 382; I. C. R. R. Co. v. Frankenberger, 54 Ill. 88; Chollette v. Omaha, etc., R. R. Co., 41 North West. Rep'r, 1106; Ohio & Miss. R. R. Co. v. Emrich, 24 Ill. App. 245; Mobile & Girard R. R. Co. v. Copeland, 63 Ala. 219; Erie Ry. Co. v. Wilcox, 84 Ill. 239. These cases do not: Nutting v. Conn. R. R., 1 Gray (Mass.), 502; Burroughs v. N. & W. R. Co., 100 Mass. 26; F. & M. Bank v. C. Tr. Co., 23 Vt. 209; Root v. Great Western R. R. Co., 45 N. Y. 524; Reed v. U. S. Ex. Co., 48 N. Y. 462; Schneider v. Evans, 25 Wis. 241; Bennett v. Filyaw, 1 Flor. 403; Kyle v. Laurens Railw., 10 Rich. (S. C.) 382; Ill. Central R. R. v. Copeland, 24 Ill. 332, 389; Hood v. New York & N. H. R., 22 Conn. 1, 502; Hunter v. Southern Pacific R. R. Co., 76 Texas, 195; Knight v. Providence & W. R. R. Co., 13 R. I. 572; Mich. Cent. R. R. Co. v. Myrick, 107 U. S. 102; Crawford v. Southern R. R. Ass'n, 51 Miss. 222; Harris v. Grand Trunk Ry. Co., 15 R. I. 371.

⁷ Babcock v. L. S. & M. S. R. Co., 49 N. Y. 491; Hinckley v. N. Y. C. & H. R. R. R. Co., 56 N. Y. 429; Am. Ex. Co. v. Second N. Bank, 69 Penn. St. 394.

⁸ Simkins v. N. & N. L. St. Co., 11 Cush. 102; Hinckley v. N. Y. C. & H. R. R. R. Co., 56 N. Y. 429.

route.¹ The custom of each carrier to collect the freight already earned of the next carrier to whom the goods are delivered, along the extended line of transit, assumes the separate liability of each company.² And so does the fact that the first carrier receives from the shipper freight over his line alone.³ A contract to carry beyond his route is not to be presumed; it must be proved.⁴

An agreement fixing the freight at one sum over the entire line does not make it a through contract;⁵ nor does a payment of the entire freight in advance;⁶ nor does the circumstance that the receiving carrier unites with other lines in the use of a common warehouse (elevator), dividing the expense of transshipment and also the freight earned on goods carried over the entire line.⁷ It serves the general convenience, to adopt the natural presumption, that each carrier in a connecting line is responsible for the safe transportation of goods over his own route.⁸

§ 582. The law takes care that property in the hands of a connecting line of carriers shall remain throughout the transit under the strict protection secured to the owner at the point of departure. When the contract covers the entire route, the first carrier is responsible for the goods until they are delivered to the consignee, or stored for his benefit at the place of destination. When not delivered under a contract of this kind, the carrier receiving the goods is answerable for them until he places them in the custody of the next carrier, and he until he passes them over to the next, and so onward until they reach the consignee. The obligation to convey the goods safely is not a whit more imperative than the duty to deliver them. In fact it would appear from the decisions that the law draws the line of duty quite strictly upon the carrier at these points of transshipment along the route.⁹ It holds each carrier liable until he completes the act of delivery to the

¹ *Shelton v. Merchants' Dis. Trans. Co.*, 59 N. Y. 258.

² *Darling v. Boston & W. R. Co.*, 11 Allen, 295.

³ *Nutting v. Conn. River R. Co.*, 1 Gray, 502.

⁴ *Gray v. Jackson*, 51 N. H. 9; S. C. 12 American R. 1, and note 40.

⁵ *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Lamb v. Camden & Amboy R. & Tr. Co.*, 46 N. Y. 271; *Cin., Ham. & Dayton, and D. & M. R. R. Co.*, 19 Ohio St. 221; *Schneider v. Evans*, 25 Wis. 241.

⁶ *Washburn & M. M. Co. v. Providence & W. R. Co.*, 113 Mass. 490. See *Nashua Lock Co. v. Worcester & N. R. R. Co.*, 48 N. Y. 339.

⁷ *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Barter v. Wheeler*, 49 N. H. 9.

⁸ *Burroughs v. Norwich, etc.*, R. R. Co., 100 Mass. 26; *Mills v. Mich. Cent. R. R. Co.*, 45 N. Y. 622; *Hooper v. Chicago & N. R. R. Co.*, 27 Wis. 81; *Wood v. Milwaukee & St. Paul R. R. Co.*, 27 Wis. 541; *Conkey v. Milwaukee & St. Paul R. R. Co.*, 31 Wis. 619.

⁹ *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Goold v. Chapin*, 20 N. Y. 259; *Ladue v. Griffith*, 25 N. Y. 364; ante, §§ 339, 340; *Barter v. Wheeler*, 49 N. H. 9.

next intermediate carrier, and the last in the line until he delivers the goods to the consignee, or does some equivalent act by which his responsibility is reduced to that of a warehouseman.¹ The ground of the rule is thus stated by Judge SMITH: "The owner loses sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination. At each successive point of transfer from one carrier to another, they are liable to be placed in warehouses, there perhaps to be delayed by the accumulation of freight or other causes, and exposed to loss by fire or theft, without fault on the part of the carrier or his agents. Superadded to these risks are the dangers of loss by collusion, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule the storing under such circumstances should be held to be a mere accessory to the transportation, and the goods should be under the protection of the rule which makes the carrier liable as an insurer, from the time the owner transfers their possession to the first carrier till they are delivered to him at the end of the route."²

§ 583. A through contract binds the company making it, irrespective of the means to be used in its fulfillment.³ When the bill of lading given by the first carrier, by a fair construction, imports a contract to carry over the whole line and deliver the goods at the place of destination, it must be enforced according to its terms; the exemptions contained in it apply to the whole route;⁴ and the contracting carrier must fulfill the stipulations on his part.⁵ The carrier's contract to forward the goods from the terminus of his line is construed literally as an engagement to send them forward;⁶ while a carrier's contract in

¹ *Mills v. Michigan Central R. R. Co.*, 45 N. Y. 622; *Hooper v. Chicago & N. R. Co.*, 27 Wis. 81; *Wood v. Milwaukee & St. Paul R. Co.*, 27 Wis. 541; *Conkey v. Milwaukee & St. Paul R. Co.*, 31 Wis. 619; 11 Amer. R. 630; *McDonald v. Western R. Co.*, 34 N. Y. 497.

² *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505.

³ *Mercantile M. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Reed v. Spaulding*, 5 Bosw. 395, 404; *S. C.* 30 N. Y. 630; *Clyde v. Hubbard*, 88 Pa. St. 358; *Newell v. Smith*, 49 Vt. 255; *Falvey v. Georgia R. R. Co.*, 76 Ga. 597; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438.

⁴ *Railroad Co. v. Androscoggin Mills*, 22 Wallace, 594; *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514; *Halliday v. St. Louis, etc., Ry. Co.*, 74 Mo. 159; *Southwestern R. R. Co. v. Thornton*, 71 Ga. 61.

⁵ *Burtis v. Buffalo & State Line R. Co.*, 24 N. Y. 269; *Noyes v. Rutland & B. R.*, 27 Vt. 110; 104 Mass. 122; *Buffett v. Troy & Boston R. R. Co.*, 40 N. Y. 168.

⁶ *Reed v. U. S. Ex. Co.*, 48 N. Y. 462; *Am. Ex. Co. v. Second National Bank*, 69 Penn. St. 394; *Burroughs v. Norwich & W. R. Co.*, 104 Mass. 26; *Gray v. Jackson*, 51 N. H. 9.

general terms to forward goods or packages having an address upon them, indicating the place of destination, has been construed, in connection with a general arrangement between the connecting lines, as an agreement to carry and deliver at the place indicated by the address.¹

The shipper of goods under a through contract has nothing to do with the contracting carrier's arrangement with the companies forming the connecting line. There is no privity between him and the other parties to the arrangement. He has a right to rely on the contract.²

These through contracts cannot be made without authority;³ but the authority of an agent to give through bills of lading may be proved by showing that he was supplied by the carrier with printed bills of that kind, or that he agreed upon and received the amount of freight to the place of destination and executed the usual contract.⁴

A through contract may be proved by circumstances;⁵ *e. g.*, by showing that the receiving carrier had an arrangement with other lines for the transportation of through freight, and that he advertised and held himself out to the business community as engaged in carrying freight between two given points, over connecting roads or lines of transportation, charging a single freight for the entire distance; and that he received the goods in question with that understanding.⁶

§ 584. A verbal contract to receive and carry goods is valid, and may consist with a receipt afterwards given for a parcel of goods.⁷ After the verbal agreement has been acted upon and rights have accrued under it, it is not merged in a bill of lading sent to the shipper and through inadvertence not examined by him.⁸ But where the shipper,

¹ *Nashua Lock Co. v. Worcester & N. R. R. Co.*, 48 N. H. 339; *Ill. C. R. Co. v. Frankenberg*, 54 Ill. 88; *Cutts v. Brainerd*, 42 Vt. 566.

² *Condict v. Grand Trunk R. Co.*, 4 Lansing, 106; *S. C. 54 N. Y. 500*; *King v. Macon & Western R. R. Co.*, 62 Barb. 160.

³ *Wait v. Albany & Susq. R. Co.*, 5 Lans. 475; *Burroughs v. Norwich, etc., R. R. Co.*, 100 Mass. 26.

⁴ *Condict v. Grand Trunk R. Co.*, *supra*; *Kreuder v. Woolcott*, 1 Hilton, 223; *La Sage v. Great Western R. Co.*, 1 Daly, 306; *Goodrich v. Thompson*, 44 N. Y. 324; *Ogdensburg, etc., R. R. Co. v. Pratt*, 22 Wallace, 123, 131.

⁵ *Aiken v. Chicago, B., etc., R. R. Co.*, 68 Iowa, 363.

⁶ *Root v. Great Western R. R. Co.*, 45 N. Y. 524; *Railroad Co. v. Pratt*, 22 Wallace, 123, 131; *Irwin v. N. Y. Central R. Co.*, 1 N. Y. Sup. Ct. (T. & C.) 473; *S. C. 59 N. Y. 653*, *White Line*. See *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 219, 220.

⁷ *Blossom v. Griffin*, 13 N. Y. 569.

⁸ *Bostwick v. Balt. & Ohio*, 45 N. Y. 712; *Hill v. Syracuse, B. & N. Y. R. R. Co.*, 8 Hun, 296; *S. C. 73 N. Y. 351*; *Coffin v. N. Y. C. R. R. Co.*, 64 Barb. 379; *S. C. 56 N. Y. 632*; *Guillaume v. General Transportation Co.*, 100 N. Y. 491; *Germania Fire Ins. Co. v. Memphis, etc., R. R. Co.*, 72 N. Y. 90; *Wheeler v. N. B. & C. R. R. Co.*,

on delivering the property, takes from the carrier a bill of lading or other voucher expressing the terms upon which the property is to be carried, the writing is under ordinary circumstances to be taken as the final agreement between the parties;¹ excluded parol evidence to vary its terms;² and not excluding proof of instructions respecting the mode or route of transportation, in harmony with its language;³ and not excluding proof of the customary mode of delivering goods and taking for them receipts, to be afterwards supplemented by bills of lading.⁴

The usual bill of lading partakes of a two-fold character; it is both a receipt and a contract. It is a receipt specifying the articles taken on board of a vessel; and it is a contract to deliver the same at a certain place and to a certain party. So far as it is a receipt, it is open to explanation; and so far as it is a contract, it cannot be varied by parol testimony.⁵ Originally the term, *bill of lading*, was used as descriptive only of the ship carrier's contract; recently, it is coming to be used as equally descriptive of a land carrier's contract.⁶

§ 585. The receipt embodied in a bill of lading, stating the property to have been received or shipped in good order, is *prima facie* proof of its condition, as received by the carrier;⁷ and of the quantity, as

115 U. S. 29; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 219; *Louisville & N. R. R. Co. v. Meyer*, 78 Ala. 597; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438, 449.

¹ *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76; 62 N. Y. 171; *Germania Fire Ins. Co. v. Memphis, etc., R. R. Co.*, 72 N. Y. 90; *Guillaume v. General Transp. Co.*, 100 N. Y. 491; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438, 446.

² *White v. Ashton*, 51 N. Y. 280; *Hinckley v. N. Y. Central & H. River R. R. Co.*, 56 N. Y. 429.

³ *Maghee v. Camden & Am. R. R. Co.*, 45 N. Y. 514, 522; *Riley v. N. Y., L. E., & W. R. R. Co.*, 34 Hun, 97.

⁴ *Shelton v. Merchants' Dispatch Trans. Co.*, 59 N. Y. 259.

⁵ *Edwards on Factors and Brokers*, § 6; *Meyer v. Peek*, 28 N. Y. 590; *Witzler v. Collins*, 70 Me. 290; *Doty v. Thomson*, 39 Hun, 243.

⁶ Here is the old form of the Bill of Lading, as given by Abbott on Shipping, Part 4, Ch. 4, 7th ed.

"J. W., } SHIPPED, by the grace of God, in good order, by A. B., merchant, in No. 1 a 20. } and upon the good ship called the John and Jane, whereof C. D. is master, now riding at anchor in the river Thames, and bound for Barcelona in Spain, twenty bales, containing one hundred pieces of broadcloth, marked and numbered as per margin; and are to be delivered in the like good order and condition at Barcelona aforesaid (the dangers of the seas excepted) unto E. F., merchant there, or to his assigns, he or they paying for the said goods per piece freight with prime and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading of this tenor and date, one of which bills being accomplished, the other two to stand void. And so God send the good ship to her destined port in safety."

⁷ *Price v. Powell*, 3 N. Y. 322; *Ellis v. Willard*, 9 N. Y. (5 Seld.) 529; *Great Western R. v. McDonald*, 18 Ill. 172.

specified in it.¹ Though not conclusive as to the amount, the carrier may bind himself by agreement to deliver the amount specified; ² and the receipt itself may bind him in favor of a party who acquires title to the goods while they are in transit.³

The receipt takes effect according to its terms. Given for a sealed package, "said to contain" or without specifying the contents, it is evidence only of the receipt of the package; and it rests with the shipper to prove the contents and value.⁴ The whole statement, including like phrases, is to be read together.⁵

§ 586. The exception in a bill of lading is an essential part of the agreement, and must be stated in a complaint on the contract;⁶ and the plaintiff must allege a breach by the defendant, of the agreement as qualified by the terms of limitation.⁷ And where the plaintiff bases his action on the carrier's common law liability, it is proper for the defendant to set up the contract in his answer, and give a copy of it; and then allege that the goods were lost by accidents or casualties covered by the exception contained in the bill of lading.⁸

From an early day carriers by water have been accustomed to stipulate for exemption from liability arising from the perils of the sea; leaving the shipper of the goods to protect himself by procuring an insurance on them against those perils. The exception does not appear in the bill of lading used in the reign of Elizabeth; and it does appear in the bill used in the reign of Charles the First.⁹ It was afterwards enlarged and modified in many ways. What losses are attributable to the dangers or "perils of the sea"? The phrase is very broad, and the forces that act upon and at times work loss or damage to the ship and its cargo are capable of almost infinite modifications; but the phrase

¹ *Meyer v. Peck*, 28 N. Y. 590; *Strong v. Grand Trunk R.*, 15 Mich. 206.

² *Bissel v. Campbell*, 54 N. Y. 353; *Rhodes v. Newhall*, 126 N. Y. 574.

³ *Hastings v. Pepper*, 11 Pick. 43; *Dows v. Perrin*, 16 N. Y. 325; *Berkley v. Watkins*, 7 Adol. & Ellis, 29; 48 How. Pr. 119.

⁴ *Fitzgerald v. Adams Ex. Co.*, 24 Ind. 447; *Dunn v. Branner*, 13 La. Ann. 452; *The Columbo*, 19 Law Rep. 376; 3 Blatchf. C. C. 524. See *Miller v. Hannibal & St. Jo. R. R. Co.*, 90 N. Y. 430; *Roth v. Hamburgh Am. Packet Co.*, 35 State Rep'r, 89.

⁵ *Kelly v. Bowker*, 11 Gray, 428; *Shepherd v. Naylor*, 5 Gray, 591; *Clark v. Barnwell*, 12 How. 272; *Bissel v. Price*, 16 Ill. 408; *Miller v. Hannibal & St. Jo. R. R. Co.*, 90 N. Y. 430, 435.

⁶ *Cope v. Cordova*, 1 Rawle, 203.

⁷ *Spence v. Chadwick*, 10 Q. B. 517; *Howland v. Greenway*, 22 How. U. S. 491; *Morrison v. Davis*, 20 Penn. St. 171.

⁸ *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485, 486, 491. See *Gleadell v. Thomson*, 56 N. Y. 194.

⁹ Ch. J. KENT, in *Elliott v. Rossell*, 10 John. R. 1, 8, 9, refers to these exceptions as evidence of the common law.

is not broadly construed. The danger from fire, which is certainly enhanced by the situation of the ship, is not considered a peril of the sea.¹ The phrase is considered descriptive of those dangers arising from the elements, which occur without the intervention of human agency, and which the prudence of man cannot foresee, nor his strength resist.² It covers losses by collision without fault on the part of the carrier;³ and it does not cover losses arising in part through his negligence;⁴ nor such as he might have foreseen and ought to have prevented.⁵

§ 587. It has been asserted that a carrier does not by excepting "the dangers of the seas," vary or qualify his common law liability; in other words, that whatever is a peril of the sea will excuse the carrier without any stipulation to that effect.⁶ But while it is plain enough that the phrase covers many acts of superior force for which the carrier is not liable under the general rule, it is also clear that the exception relieves him from some losses for which he is otherwise liable.⁷ By legal intendment the exception covers those perils of the seas, or accidents incident to navigation, not included among the acts of God.⁸ The law

¹ *Morewood v. Pollock*, 1 Ellis & Black. 743; S. C. 18 Eng. L. & Eq. 341; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. Rep. 344; *Garrison v. Memphis Ins. Co.*, 19 How. U. S. 312.

² 3 Kent's Com. 300; *Schooner Reeside*, 2 Sumner, 571.

³ *Smith v. Scott*, 4 Taunt. 126; *Hays v. Kennedy*, 41 Penn. St. 378. *Buller v. Fisher* (3 Esp. 67) was an action against the owners of the ship *Atlas*, for the loss of goods shipped in her, and the bill of lading excepted the perils of the sea. The circumstances presented were these: Two ships, called the *Patriot* and the *Matthew*, were sailing in one direction, and the *Atlas* in another; the *Matthew* was to leeward when they saw the *Atlas* coming; the *Matthew* steered to keep closer to the wind, in order to give the *Atlas* an opportunity to pass; the *Atlas* mistook the object, and unable to weather both ships, she and the *Patriot* ran foul of each other, and the *Atlas* went down. Lord KENYON: "If the defendants have been guilty of any degree of negligence, and it could have been proved that the accident might have been prevented, they would have certainly been liable; but they are exempt by the condition of the charter-party from misfortunes happening during the voyage, which human prudence could not guard against—against accidents happening without fault of either party. I am of opinion that neither ship could be deemed to be in fault; and that the misfortune must be taken to be within the exception of the perils of the sea."

⁴ *Converse v. Brainard*, 27 Ct. 607; *Lloyd v. Gen. Iron Screw Collier Co.*, 3 II & C. 284.

⁵ *New Haven Steamboat Co. v. Vanderbilt*, 16 Ct. 420; *Sills v. Brown*, 9 Carr. & Payne, 661; *Blythe v. Marsh*, 1 N. & McCord, 360; *Fairchild v. Slocum*, 19 Wend. 329.

⁶ *Crosby v. Fitch*, 12 Ct. 410; following *Williams v. Grant*, 1 Ct. R. 487.

⁷ *McArthur v. Sears*, 21 Wend. 190, 198; ante, § 546.

⁸ Judge BOCKES, in *Redpath v. Vaughan*, 52 Barb. 489, 499, and cases there cited by him. S. C. 48 N. Y. 655. Where a ship is driven by stress of weather on or near the enemy's coast, and there captured, it is a loss by capture and not by the perils

relieves the carrier from liability for losses compelled by stress of weather in order to lighten the ship;¹ and the exception in the bill of lading will excuse him from losses that cannot be attributed to the act of God;² but will not enable him to recover freight on the goods not delivered, or to retain it where it is paid in advance.³

Similar exceptions, covering the dangers of navigation, the dangers of the lake or the river, are construed on the same principle; they relieve the carrier from losses coming within the very terms of the exception, provided the carrier shows that the goods were lost by the perils specified in the exception. The burden of proof still rests with the carrier.⁴

of the sea; but where the vessel is lost or destroyed by the waves some miles from the shore, and then plundered by the enemy, it is a loss by the perils of the sea. It is not material how near the shore or how far from it the loss occurs; if the vessel be wrecked, stranded or lost, and afterward visited by the enemy who captured the cargo, it is considered a loss by the perils of the sea, these being the immediate cause of the loss. The law regards the proximate and not the remote cause. *Hahn v. Corbett*, 2 Bing. R. 205; *Green v. Elmslie*, Peake N. P. C. 278; *Bondret v. Heutigs*, Holt N. P. C. 149. Under an exception in these words, "the act of God, the King's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever, save risk of boats so far as ships are liable thereto excepted," the carrier was not held liable for goods dispatched from the ship in a boat, as usual, at the place of her destination, and lost in a hurricane. *Johnston v. Benson*, 1 Brod. & Bing. 454.

¹ *Price v. Hartshorne*, 44 Barb. 655; S. C. 44 N. Y. 94. In this case the carrier, in order to save his vessel and the residue of the cargo from total loss by sinking, was obliged to throw overboard the grain stored on the deck; and it was held justified by the necessity, so that the carrier was not liable therefor under the usual contract.

² *Laurie v. Douglas*, 15 Mees. & Wels. 746; *Kingsford v. Marshall*, 8 Bing. 458. See *Merritt v. Earle*, 29 N. Y. 115; 52 Barb. 489. The destruction of goods by rats has been held a loss by perils of the sea. *Carrigues v. Cox*, 1 Binn. 592; but cannot now be so regarded; *Aymar v. Astor*, 6 Cowen, 266; *Laveroni v. Drury*, 8 Exch. 166; 16 Eng. L. & Eq. 510.

³ *Phelps v. Williamson*, 5 Sandf. 578; *Griggs v. Austin*, 3 Pick. 20.

⁴ An exception in these words, "dangers of the river only excepted," used in a bill of lading, covers only such dangers as cannot be guarded against by human skill and foresight; it has the same sense as these words, "dangers of the river which are unavoidable." It releases the carrier from liability for accidents and loss occasioned by invisible snags or hidden obstructions newly placed in the river, so that human skill and foresight cannot discover and avoid them. *Johnson v. Friar*, 4 Yerg. (Tenn.) 48, relating to an invisible snag in the Hatchie river; *Gordon v. Buchanan*, 5 Yerg. 71; to the like effect is *Redpath v. Vaughan*, 48 N. Y. 655. The exception does not change the burden of proof. In *Turney v. Wilson* (7 Yerg. 340) the court instructed the jury that the "dangers of the river, as defined by the law, means all hidden obstructions in the river, as rocks, logs, sawyers, and the like, which could not be foreseen nor avoided by human prudence; and that before the carrier can be excused in a case of loss, he must show that the loss happened from some cause which human foresight or prudence could not avert;" and the charge was held proper. See *Hooper v. Wells, Fargo & Co.*, 27 Cal. R. 1.

§ 588. May the contract embodied in a bill of lading be controlled in its legal effect by proof of usage? Being free from ambiguity, verbal

It rests with the carrier to exonerate himself from liability; he is liable unless he proves a loss of the goods from a cause within the exception. Where a box of sovereigns was shipped, to be carried from New York to Mobile, and the bill of lading contained the usual exception, "against perils of the seas," and the vessel being wrecked on the Honda Reefs, the captain removed the box from the state-room where it could be locked up, and placed it in the run where the crew had free access, and allowed it to remain there without personally superintending it while the wreckers were on board, and the box was lost; it was held that the burden of proof was on the carrier to show that the loss occurred by a "peril of the sea;" and that failing in this, he must be held liable for the loss; that embezzlement was not a peril of the sea, and that theft and robbery were perils of the sea, only where they amounted to the crime of piracy on the high seas; that the fact of the wreck did not vary the liability of the carrier unless the property perished or was lost with the wreck, and in consequence of it, and that the carrier was bound to exert all possible diligence, care and skill. *King v. Shepherd*, 3 Story, 349; *Shaw v. Gardner*, 12 Gray, 488.

The decisions have the same drift in Pennsylvania. Thus, where a steamboat on the Ohio ran upon a stone and stove a hole in her bottom, the carrier was not discharged from liability by virtue of the exception in his bill of lading, "the dangers of the river only excepted;" but was held to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. *Whitesides v. Russell*, 8 Watts & Serg. 44. The same exception of the "dangers of the river" will cover a loss caused by collision with another boat, on proof that the loss did not occur by the carrier's negligence, or that it could not have been prevented by reasonable skill and diligence, by the hands on board. *Whitesides v. Thurkill*, 12 Smedes & Marshall, 599. So in respect to the dangers of the lake; *Fairchild v. Slocum*, 19 Wend. 329; 7 Hill, 292. Without any exception in the bill, the carrier is liable for a loss by collision at sea. *Plaisted v. Boston & K. Steam Nav. Co.*, 27 Maine, 132; 11 N. Y. 9. An exception of "unavoidable accidents," and an exception of "unavoidable dangers and accidents of the road," are not, either of them, considered as a restriction of the carrier's general liability. *Walpole v. Bridges*, 5 Blackf. 222; *Fish v. Chapman*, 2 Kelly R. 349.

"The dangers of navigation" are interpreted like other similar exceptions; it covers the dangers which are fairly attributable to the navigation; it does not cover losses arising from negligence or the want of due skill on the part of the carrier's servants. *Hays v. Kennedy*, 41 Penn. St. 378; and when the exception relates to the navigation of a public canal, it covers only such dangers as are incident to it when the trip is made in conformity with the public regulations, of which the carrier must take notice; and hence he must answer for a damage arising from the bilging of his boat in a lock entered by him in contravention of the canal rules. *Atwood v. Reliance Transp. Co.*, 9 Watts, 87. See *Johnson v. Belden*, 47 N. Y. 130, where the action was against a canal officer. So where he receives goods on a contract "excepting the dangers of the navigation," to go by a particulate route, he will be liable for a loss occurring on a different route. *Hand v. Baynes*, 4 Whart. 204. What is the risk of navigation? *Pitcher v. Hennessy*, 48 N. Y. 415. Reserving the privilege of reshipment or transshipment does not affect the contract. *Dausett v. Wade*, 2 Scam. 285; *Little v. Simple*, 8 Mis. R. 99.

evidence is not received to vary the terms or the legal import of the contract; *e. g.*, where a clean bill of lading is given, which imports that the goods are to be stowed under deck, parol evidence will not be received to prove a verbal agreement that the goods were to be stowed *on deck*.¹ All prior, as well as contemporaneous stipulations are merged in the writing;² verbal evidence of these are therefore excluded under the general rule, applicable to all contracts.³ The writing does not exclude proof of extrinsic facts and circumstances;⁴ or proof of mistake or fraud.⁵ And it does exclude the proof of local usage to limit or qualify the carrier's liability under the contract or under the common law.⁶

A custom or usage of business may be proved to assist in the interpretation of a bill of lading, or to show performance under it; and the proof will have the same effect upon this as upon other contracts.⁷ It is received to interpret or explain, but not to vary or contradict the contract.⁸ It may be received to justify carrying goods on deck, on a lake or river, or along the coast, according to the established course of trade.⁹ It would defeat the intent of the parties to exclude proof of a custom of this kind.¹⁰

¹ *Creery v. Holly*, 14 Wend. 26; *Niles v. Culver*, 8 Barb. 205; *White v. Van Kirk*, 25 Barb. 16.

² *Renard v. Sampson*, 12 N. Y. 561; *Fitzhugh v. Wyman*, 5 Seld. 559.

³ *Thompson v. Sloan*, 23 Wend. 71, 76; *Barry v. Ransom*, 12 N. Y. 462; *Bank of Albion v. Smith*, 27 Barb. 489.

⁴ *Harmon v. N. Y. & Erie R. R. Co.*, 28 Barb. 323.

⁵ *Graves v. Harwood*, 9 Barb. 477.

⁶ *Simmons v. Law*, 8 Bosw. 213; *S. C. 3 Keyes*, 217; *Wolfe v. Myers*, 3 Sandf. 7; per *COWEN, J.*, 21 Wend. 194; *Brittan v. Barnaby*, 21 How. (U. S.) 527; *Oliver v. Memphis Ins. Co.*, 19 How. (U. S.) 312. *Contra*: *Gordon v. Little*, 8 Serg. & Rawle, 533; *Singleton v. Hilliard*, 1 Stobhart, 203, allowing testimony to restrict the carrier's liability by usage. Usage was excluded to show a damage by rats, *a peril of the sea*, in *Aymar v. Astor*, 6 Cowen, 266.

⁷ *Walls v. Bailey*, 49 N. Y. 464; *Kirchner v. Venus*, 12 Moore Priv. Coun. Cases, 361. For the difference between custom and usage, see *Hursh v. North*, 40 Penn. St. 241. See also *Wayne v. Steamboat Gen. Pike*, 16 Ohio, 421.

⁸ *Schooner Reeside*, 2 Sumn. 567; *Turney v. Wilson*, 7 Yerg. 340; *Smith v. Clews*, 114 N. Y. 190; *Snowden v. Guion*, 101 N. Y. 458; *Hopper v. Sage*, 112 N. Y. 530, 535; *Colgate v. Pennsylvania Co.*, 31 Hun, 297; *Newhall v. Appleton*, 114 N. Y. 140; *Silberman v. Clark*, 96 N. Y. 522; *Atkinson v. Truesdell*, 127 N. Y. 230. As to the distinction between the proof of a usage and proof by experts of the meaning of a technical term or phrase, see *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453.

⁹ *Harris v. Moody*, 30 N. Y. 266; *Nelson v. Belmont*, 21 N. Y. 36; *May v. Babcock*, 4 Ohio, 334.

¹⁰ The usage in shipping goods and giving bills of lading may be considered on a question of title to the cargo. *Blossom v. Champion*, 37 Barb. 554; *Brower v. Peabody*, 13 N. Y. 121.

Custom and the course of business may also be proved, as evidence tending to show a delivery to the carrier, or a delivery by the carrier;¹ and as evidence of performance according to the true intent of the contract.

§ 589. In actions on policies of insurance against the perils of the sea, the rule of construction is somewhat more liberal toward the assured than it is toward the carrier, who has made an exception of these perils in the charter-party or bill of lading.² The underwriter assumes the risk of loss from these perils for a consideration, and he cannot relieve himself from liability for a loss within the enumerated perils, by showing that the loss was remotely caused by the negligence of the master and mariners.³ The principle is the same as it is where he insures against a loss by fire, and is not allowed to escape liability for the loss insured against, by showing that the fire arose from the negligence of the insured or that of his agents or servants.⁴ The policy may be so drawn that it will not bind the underwriter, to answer for losses arising directly or indirectly from the want of ordinary care and skill, in the lading or navigation of the vessel.⁵ But when the policy insures a vessel or cargo against the perils of the seas, lakes or rivers, the insurers are liable for losses arising directly from those perils—*i. e.*, for any damage to, or loss of the property insured.⁶ Negligence by the master

¹ Ante, §§ 524, 525; *Blin v. Mayo*, 10 Vt. 56; *Gibson v. Culver*, 17 Wend. 305; *Huston v. Peters*, 1 Met. Ky. 558; *Dixon v. Dunham*, 14 Ill. 324; *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258; 5 Pick. 371.

² *Columbia Ins. Co. v. Lawrence*, 10 Peters, 507; *Waters v. Merchants' Ins. Co.*, 11 Peters, 213; *Peters v. Warren Ins. Co.*, 14 Peters, 99; 2 Story's R. 176.

³ *Walker v. Maitland*, 5 Barn. & Ald. 171; *Draper v. Com. Ins. Co. & Columbia Ins. Co.*, 4 Duer, 234, 239; *Copeland v. New E. M. Ins. Co.*, 2 Metc. 435; *Bishop v. Pentland*, 7 Barn. & Cress. 219.

⁴ *Gates v. Madison Co. M. Ins. Co.*, 1 Seld. 5 N. Y. 469, 478.

⁵ *Savage v. Corn Ex. Fire and Inland Nav. Ins. Co.*, 4 Bosw. 1, 19; S. C. 36 N. Y. 655. For an insurance against perils, excepting *ice*, see *Dows v. Howard Ins. Co.*, 5 Robt. 473; *Allison v. Corn Ex. Ins. Co.*, 57 N. Y. 87.

⁶ The contract is intended to insure the owner against the specified sea risk; the owner impliedly engages that the vessel is seaworthy; and the underwriter engages to insure the vessel or cargo against certain risks. He may assume to bear *all risks*, and render himself liable for all losses except such as arise from the fraud of the insured. *Goix v. Knox*, 1 John. Cases, 337. The general words in a policy are not construed so broadly. *Moses v. Sun Mutual Ins. Co.*, 1 Duer, 159. An insurance on goods against loss by thieves may bind the underwriter for losses by theft perpetrated by parties not connected with the ship. *Atlantic Ins. Co. v. Sterrow*, 5 Paige Ch. 285; and when the policy upon a cargo insures against perils from thieves and barratry of the master and mariners, it covers a loss by theft, whether the offense is committed by the crew or by others; it is not limited to external or assailing thieves. *American Ins. Co. v. Bryan*, 1 Hill, 25; S. C. 26 Wend. 563. Insurance against barra-

or mariners does not relieve them ; and, on the other hand, they do not undertake for the good conduct, skill and prudence of these persons employed on the vessel. Hence where the insured vessel, through the negligence of her master and crew, comes in collision with another vessel and is condemned in damages therefor, the underwriters are not answerable for these damages ; since they do not insure against the negligence of the master and mariners as a distinct cause of loss, considered apart from the property insured.¹

The law holds the insurer to the terms of his contract, and where he insures against loss by a specific peril, it does not consider the secondary cause of the loss. " It were infinite for the law to consider the cause of causes, and their impulsions one of another ; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." *Causa proxima, non remota spectatur.*² If two causes of loss combine in working damages, and the owner of the injured property holds a policy, insuring him against one of these causes and not against the other, he is entitled to recover the damages resulting from the cause covered by the policy, where these can be distinguished and separated from the others.³ And he has no right of action where the uninsured cause is the efficient agent in creating a total wreck ; as where he procures a policy of insurance on a building or on a vessel, excepting therefrom losses arising from an explosion, and the property is destroyed by an explosion.⁴

§ 590. A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by water, for a certain freight. It is signed by the captain or master of the ship or vessel, and states, among other things, by whom the goods are shipped, and where, and to whom they are to be delivered. There are generally three or more parts of the instrument ; one of which is usually sent to the consignee by the ship which carries the goods ; another is sent to him by some other con-

try is rather anomalous, and not to be extended by construction : *Hallett v. Col. Ins. Co.*, 8 John. 272 ; 1 Term R. 330 ; it is not included among the perils of the sea ; *Waters v. Merchants' Ins. Co.*, 11 Peters, 213 ; it implies bad faith on the part of the master ; *Atkinson v. Great Western Ins. Co.*, 65 N. Y. 531.

¹ *Mathews v. Howard Ins. Co.*, 11 N. Y. 1, 16 ; *Gen. Mutual Ins. Co. v. Sherwood*, 14 Peters, 351 ; *De Vaux v. Salvador*, 4 Adol. & Ellis, 420 ; 31 Eng. Com. Law, 104 ; *Perrin v. Protection Ins. Co.*, 11 Ohio, 147.

² *Bacon's Max. Reg.* 1 ; *Brown's Leg. Max.* 104 ; *Babcock v. Montgomery Co. Mu. Ins. Co.*, 4 N. Y. 326. The rule is applied in *Allison v. Corn Ex. Ins. Co.*, 57 N. Y. 87.

³ *Briggs v. North Amer. & M. Ins. Co.*, 53 N. Y. 446.

⁴ *Evans v. Columbian Ins. Co.*, 44 N. Y. 146 ; *Strong v. Sun Mut. Ins. Co.*, 31 N. Y. 103 ; *St. John v. Am. M. Fire & Marine Ins. Co.*, 11 N. Y. 516.

veyance; and a third is kept by the merchant or shipper.¹ The contract as used on our canals and rivers, is usually much less full and formal, without losing its true character.² It binds the master, the ship and the general owner.³ It is valid when signed by the owner, though not signed by the master;⁴ and it is not considered a bill of lading unless it expresses or imports a contract for the conveyance of the goods.⁵

Between the shipper and the carrier the contract is enforced according to its terms, qualified only by the common law obligations incident to the bailment.⁶ The shipper, being the owner of the goods, retains the control over them, with the right to dispose of them as he sees fit. The bill of lading naming the consignees or parties to whom the goods are to be delivered does not conclude the owner and shipper; he retains a right to change his purpose and order their delivery to another party.⁷ He has the right to assign the bill of lading, which represents the goods, absolutely or as a security for the payment of advances on the property; and he may do this by indorsing over, or by simply delivering the bill with the intent to pass the title.⁸ The carrier is bound to deliver the goods to the party holding the bill given by him to the shipper.⁹

When the owner of goods sells and ships them to the purchaser, and sends to him the bill of lading, thus enabling him to take possession of the goods on their arrival, the bill becomes evidence of title in the consignee; and while the sending of the bill of lading to the purchaser does not cut off the right to stop the goods in their transit, there is *prima facie* a presumption of title in the consignee.¹⁰ The legal effect of thus

¹ Covill v. Hill, 4 Denio, 323, 330.

² Dows v. Greene, 16 Barb. 72; Dows v. Rush, 28 Barb. 157; Dows v. Perrin, 16 N. Y. 325; Dows v. Greene, 24 N. Y. 638.

³ Schooner Freeman v. Buckingham, 18 How. U. S. 182.

⁴ Rawls v. Deshler, 3 Keyes, 572.

⁵ Holbrook v. Vose, 6 Bosw. 76, 109; Gage v. Jaqueth, 1 Lans. 207.

⁶ Dobbin v. Thornton, 6 Esp. R. 16; Simmons v. Law, 8 Bosw. 213; S. C. 3 Keyes, 217.

⁷ Mitchell v. Ede, 11 Adolph. & Ellis, 888; Cayuga Co. National Bank v. Daniels, 47 N. Y. 631.

⁸ Bank of Rochester v. Jones, 4 N. Y. 497; Merchants' Bank, v. Union R. R. & Transp. Co., 69 N. Y. 373.

⁹ The City Bank v. Rome, W. & O. R. Co., 44 N. Y. 136; Tyndal v. Taylor, 4 Ellis & Black. 219; Howard v. Shepard, 9 M. Gr. & Scott, 296; Armour v. Mich. C. R. Co., 65 N. Y. 111; Furman v. Union Pacific R. R. Co., 106 N. Y. 579; Colgate v. Pennsylvania Co., 102 N. Y. 120; Bank of Batavia v. N. Y., L. E. & W. R. R. Co., 106 N. Y. 195.

¹⁰ Sweet v. Barney, 23 N. Y. 335; Fitzhugh v. Wiman, 9 N. Y. 559; Gossler v. Schepeler, 5 Daly, 476; Krulder v. Ellison, 47 N. Y. 36; Lacker v. Rhoades, 51 N. Y. 641.

sending forward the bill depends upon the existing relation between the consignor and consignee. A shipment of the goods, in pursuance of a sale valid under the statute of frauds, and sending forward the carrier's receipt or bill of lading, vests the consignee with the title in form and in fact; but a shipment of goods under a verbal order, invalid as a sale, does not become valid so as to vest the title in the consignee, until the goods are accepted and received by him.¹ When the goods are selected, and shipped by the conveyance chosen by the purchaser, the title passes on a delivery to the carrier; and here the bill of lading in the hands of the purchaser is evidence of his actual title, though not required to perfect his title.² The bill does not constitute the title, and the law does not give effect to it as a negotiable instrument.³

§ 591. We have seen that the bill of lading may be indorsed or transferred as evidence of an absolute sale, and as a pledge or mortgage of the goods covered by it.⁴ It remains to notice the ground on which it is thus capable of being used to effect different purposes. A merchant making a consignment of goods to his factor for sale takes from the carrier a bill of lading showing on its face his title to the property—a contract which is assignable conditionally or absolutely at his pleasure, and may be assigned by indorsing or delivering over the bill; and the assignment may be qualified by parol proof showing the purpose of the transfer.⁵ As owner he may pledge or mortgage the goods covered by the bill, and order their delivery to the transferee.⁶ On the same principle, a merchant receiving advances upon goods under an agreement that he will ship them to the party making the advances, to be sold to meet the indebtedness, transfers the title by shipping the goods to the advancer and sending him the bill of lading or any like evidence showing an intent to transfer the title.⁷ The consignee having made advances upon the specific goods, stands in a position analogous to that of a vendee

¹ *Rodgers v. Phillips*, 40 N. Y. 519; *Cross v. O'Donnell*, 44 N. Y. 661; *Caulkins v. Hellman*, 47 N. Y. 449; *Norman v. Phillips*, 14 Meeson & Welsby, 277.

² *Cross v. O'Donnell*, supra, 44 N. Y. 661, 665. The goods must be accepted. *Stone v. Browning*, 51 N. Y. 211. See *Magruder v. Gage*, 33 Md. 344; *Allard v. Greasert*, 61 N. Y. 1; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17.

³ *Barnard v. Campbell*, 55 N. Y. 456, 462; *S. C.* 58 N. Y. 73; *Pollard v. Vinton*, 105 U. S. 7; *Shaw v. Merchants' Bank*, 101 U. S. 557; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 195.

⁴ Ante, §§ 590, 211–214; *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 508.

⁵ *Haille v. Smith*, 1 Bos. & Pull. 563; *Bryans v. Nix*, 4 Mees. & Welsb. 791; *Bank of Rochester v. Jones*, 4 N. Y. 497, 501; *Conrad v. Atlantic Ins. Co.*, 1 Peters, 144.

⁶ *First Nat. Bank of C. v. Kelly*, 57 N. Y. 34; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *Cayuga Co. Nat. Bank v. Daniels*, 47 N. Y. 631; *M. & T. Bank v. F. M. Nat. Bank*, 60 N. Y. 40; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283.

⁷ *Bailey v. Hudson River R. R. Co.*, 49 N. Y. 70; *Ogg v. Shuter*, 11 English R. 316.

after he has paid the purchase money and the property has been shipped to him.¹ And so when the bill of lading is delivered to the consignee to meet a draft drawn against the consignment, he cannot retain the bill without accepting or paying the draft, according to the agreement.²

§ 592. A stipulation in the bill of lading fixing the amount of the freight and demurrage, with a provision that the same is to be paid by the consignee, does not bind a factor to whom the goods are sent for sale on commission, until he accepts them. By accepting the consignment, he makes himself a party to the contract of affreightment, and becomes liable to the carrier for the freight and damages stipulated for in the bill of lading.³ And the rule is general, that the consignee receiving the cargo is liable for the freight; and that the assignee of the bill receiving the cargo is liable for the freight.⁴ The ordinary contract of the carrier is to deliver the goods to the consignee or his assignees, "he or they paying freight for the same;" and the party accepting a delivery under the bill impliedly engages to pay the freight.⁵ The rule does not apply to an intermediate consignee, receiving in order to forward the goods;⁶ and it does apply to the ultimate consignee, both when he is, and when he is not, the owner of the goods.⁷ Being the owner of the goods, the contract of shipment binds him from the beginning;⁸ and where the bill does not otherwise provide, he is liable on the contract for the freight,⁹ to be computed and ascertained according to the stipulations contained in it.¹⁰

§ 593. A provision in the bill relating to the time and mode of the delivery, with a stipulation for demurrage at a certain rate, binds the consignee accepting and receiving the property; on the ground that when he accepts the consignment he makes himself a party to the con-

¹ *Grosvenor v. Phillips*, 2 Hill, 147; *Holbrook v. Wight*, 24 Wend. 169.

² *Bank of Rochester v. Jones*, 4 Denio, 489; S. C. 4 N. Y. 497; *Grant v. Shaw*, 16 Mass. R. 341; *Murdock v. Mills*, 11 Metcalf R. 5; *Allen v. Williams*, 12 Pick. R. 297; *Craig v. Sibbett & Jones*, 15 Penn. St. 238. See *Edwards on Bills and Notes*, 422-424, marg. page; *Ogg v. Shuter*, 11 English (Moak), 316.

³ *Dupeirat v. Wolf*, 29 N. Y. 436; *Milliken v. Dehon*, 27 N. Y. 361; *Morse v. Peasant Brothers*, 7 Bosw. 199; 26 N. Y. 86. See *Woodruff v. Havemeyer*, 106 N. Y. 129.

⁴ *Davison v. City Bank*, 57 N. Y. 81; *Seggart v. Scott*, 6 Esp. R. 22; *Moller v. Living*, 4 Taunt. 102.

⁵ *Dart v. Ensign*, 47 N. Y. 619; *Hinsdell v. Weed*, 5 Denio, 172; post, § 643.

⁶ *Davis v. Pattison*, 24 N. Y. 317, 320.

⁷ *Nelson v. Hudson River R. R. Co.*, 48 N. Y. 498; *Davison v. City Bank*, 57 N. Y. 81.

⁸ *Idem*; *Sheets v. Wilgus*, 56 Barb. 662.

⁹ *Gilson v. Madden*, 1 Lans. 172; *Barker v. Havens*, 17 John. R. 234; 47 N. Y. 619.

¹⁰ *Ward v. Whitney*, 8 N. Y. (4 Seld.) 442. The liability arises on contract and not on title. *Martin v. Smith*, 1 N. Y. S. C. (T. & C.) 20; S. C. 58 N. Y. 672.

tract embodied in the bill of lading.¹ The carrier recovers according to the terms of the stipulation ; and where the time for unloading is left to be regulated by the custom of the port, the consignees are only liable for damages by the delay not warranted by the custom.¹ *Prima facie*, Sundays are to be excluded, under a stipulation fixing the charge to be allowed per day for demurrage ; these not being regarded by the law as working days.² If the boat or vessel be delayed a certain number of days and *hours* beyond the stipulated time, a day is to be reckoned as twenty-four hours ; and the stipulated time counted from the arrival of the vessel in the adjacent waters, with notice of readiness to discharge cargo.³ The carrier has no lien on the goods for damages in the nature of demurrage.⁴

When the contract is specific, it is enforced quite strictly ;⁵ but in the absence of any stipulation fixing the time for unloading, there is an implied agreement for a reasonable time, which may be affected by a press of business ;⁶ and cannot be extended for the purpose of giving the consignee an opportunity to effect a sale.⁷

Under a contract of affreightment the freighter is bound to load a vessel within a reasonable time ; and the consignee can only be rendered liable for his neglect, by showing the freighter's authority to bind him by the contract.⁸ A detention of the vessel caused by the consignee, delaying the discharge of her cargo, renders him liable in damages ; it is a breach of his contract, express or implied, to return the vessel to the general use of the owner in a reasonable time.⁹ And one effect of this breach, after the carrier has tendered a delivery and after the lapse of a reasonable time for unloading the vessel, is to reduce the carrier's liability to that of an ordinary bailee for hire.¹⁰

¹ *Morse v. Peasant Brothers*, 7 Bosw. 199; S. C. 2 Keyes, 16; *Merian v. Funk*, 4 Denio, 110; *N. Y. & Havre Steam Nav. Co. v. Young*, 3 E. D. Smith, 187; *Woodruff v. Havemeyer*, 106 N. Y. 129.

² *Kingney v. White*, 4 Daly, 400; *Cargo of the Mary E. Taber*, 1 Benedict, 106; *Cochran v. Retberg*, 3 Esp. 121.

³ *Wiles v. N. Y. Central & H. R. R. Co.*, 4 N. Y. Sup. Court (T. & C.), 264.

⁴ *Crommelin v. N. Y. & H. R. Co.*, 10 Bosw. 77; S. C. 4 Keyes, 90; *East Tenn., etc., R. R. Co. v. Hunt*, 15 Lea (Tenn.), 261; *Chicago, etc., Ry. Co. v. Jenkins*, 103 Ill. 588.

⁵ *Randal v. Lynch*, 2 Campb. 352; *Burmster v. Hodgson*, 3 M. & C. 267.

⁶ *Cross v. Beard*, 26 N. Y. 85.

⁷ *Huntley v. Dows*, 55 Barb. 310.

⁸ *Fisher v. Abeel*, 66 Barb. 381; *Lockhart v. Falk*, 12 English R. 573.

⁹ *Horn v. Bensusan*, 9 Carr. & P. 709; *Evans v. Foster*, 1 Barn. & Ald. 118; *Brouncker v. Scott*, 4 Taunt. 1.

¹⁰ *Clendaniel v. Tuckerman*, 17 Barb. 184; *Bradstreet v. Baldwin*, 11 Mass. 229; *Hathorn v. Ely*, 28 N. Y. 78; 10 Metc. 472; 2 Daly, 454, 473; 2 Keyes, 18. See *Western Tr. Co. v. Barber*, 56 N. Y. 544, 551.

§ 594. The master's right to bind the owners of the vessel by contract is limited to the line of his duties and within the fair scope of his employment. He cannot bind them by giving a bill of lading for property not shipped;¹ and he does not bind them by such acts and contracts as are fairly covered by his authority as an agent.² Encountering obstacles in the prosecution of his voyage, or on the route of the transportation, it is the master's duty to communicate with the owners of the vessel where that is practicable, or with the consignees, where he has the means of doing so, by telegraph, asking for instructions or advice upon the situation.³ And his failure to fulfill a duty created by the contract, equally with his unauthorized act, such as a misdelivery of the goods, binds the owners of the vessel as carriers.⁴

§ 595. The law superadds to the stipulations contained in the contract of charter-party, certain duties and obligations incident to the carrier's employment, and it enforces the contract of the parties so as to give it effect according to its terms. Where the whole of a vessel is chartered to take a cargo at certain specific rates per ton, if the shipper does not furnish a full cargo, the owner of the vessel is entitled to freight not only for the cargo actually put on board, but also for what the vessel might have carried;⁵ deducting what the vessel earned or might have earned by receiving and carrying other goods sufficient to make a full cargo.⁶ So, where a vessel is chartered for a voyage, out and home, for an entire sum of money, to be paid on her return home, her return is a condition precedent, to entitle the owner to freight; and if she be lost before commencing the homeward voyage, the owner can neither recover on the charter-party, nor on an implied assumpsit, for the freight of the outward voyage.⁷ The parties are bound by the contract; hav-

¹ *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104, commented upon by Judge SELDEN, in 16 N. Y. 125, 140, and by Judge COMSTOCK, on page 151; *Schooner Freeman v. Buckingham*, 18 How. U. S. 182; *Hubbersty v. Ward*, 8 Exch. 330; 18 Eng. Law & Eq. 551; *Jessel v. Bath*, Law Rep. 2 Exch. 267. See *Armour v. Mich. C. Co.*, 65 N. Y. 111; *Pollard v. Vinton*, 105 U. S. 7; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 195; *Sioux City, etc., R. R. Co. v. First Nat. Bank*, 10 Neb. 556; *Friedlander v. Texas & P. Ry. Co.*, 130 U. S. 416.

² Ante, § 510. The master should communicate with his principal in a home port, or where he can do so, in all cases of emergency. *Gager v. Babcock*, 48 N. Y. 154.

³ *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543; *The Convoy's Wheat*, 3 Wallace, 225.

⁴ *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442; *Guillaume v. Hamburg & Am. Packet Co.*, 42 N. Y. 212.

⁵ *Duffie v. Hayes*, 15 John. R. 327.

⁶ *Heckscher v. McCrea*, 24 Wend. 304; *Shannon v. Comstock*, 21 Wend. 457; *Ashburner v. Balchen*, 7 N. Y. (3 Seld.) 262.

⁷ *Tennoyer v. Hallett*, 15 John. R. 332; *Barker v. Cheriot*, 2 John. R. 352.

ing agreed that the freight shall be paid in one event only, the owners must abide by their agreement.¹ There must be some act of waiver to support an implied assumpsit; such as a voluntary acceptance of the goods at the place of disaster.²

VI. CARRIAGE OF GOODS.

§ 596. The essence of the common carrier's contract is to carry and deliver safely the goods entrusted to him. The manner in which he performs the undertaking becomes a matter of importance and inquiry only after a loss or injury has been sustained, in consequence of his deviating from the instructions received, or from the terms of his contract. Thus, the master of a vessel is responsible for the safe stowage of goods under deck; for if he carries them on deck without the owner's consent, and they are lost by the dangers of the sea, or thrown overboard for the safety of the vessel, the owners of the goods under deck are not bound to contribute to the loss.³ But the rule does not apply when goods are carried on deck according to the established usage, or with the shipper's knowledge and without objection on his part.⁴ The manner of receiving and transporting goods may be, and is often regulated by the contract;⁵ leaving the carrier under obligation to use skill and diligence in the mode of transportation agreed upon.⁶

The carrier is answerable for the proper stowage of the cargo with a view to the protection of each parcel or kind of goods from injuries likely to result from other parcels, or from the motion of the ship. He is bound to use prudence and skill, and stow the goods in the usual and approved manner;⁷ and yet cannot escape liability for injuries caused by the goods of other parties, received in bad condition, on proving that the goods were stowed in the usual manner.⁸ His duty to lade

¹ *Liddard v. Lopes*, 10 East R. 529. The courts enforce, they do not make contracts. *Champlin v. Rowley*, 13 Wend. 258; S. C. 18 Wend. 187.

² *Case of the Mohawk*, 8 Wallace, 153; *Home Ins. Co. v. Western Transp.* 51 N. Y. 93; *The Kathleen*, 12 English R. (Moak) 645.

³ *The Paragon*, Elwell, Master, Ware, 322; *Dodge v. Bartol*, 5 Greenl. R. 286; *Lenox v. U. S. Ins. Co.*, 3 John. Cas. 178.

⁴ *Price v. Hartshorn*, 44 Barb. 655; 44 N. Y. 94; *Harris v. Moody*, 30 N. Y. 266; *Gould v. Oliver*, 4 Bing. N. C. 134; *Crosby v. Fitch*, 12 Conn. 410.

⁵ *Empire Transp. Co. v. Wallace*, 68 Penn. St. 302; 8 Amer. R. 178; *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514.

⁶ *Empire Transp. Co. v. Wamsutta Oil Co.*, 63 Penn. St. 14.

⁷ *Blaikie v. Steambridge*, 6 C. B. (N. S.) 894; *Idem*, 911; *Sack v. Ford*, 13 C. B. (N. S.) 90; *Lamb v. Parkman*, 1 Sprague, 343.

⁸ *The Bank of Cheshire*, 2 Sprague, 28; *Brass v. Maitland*, 6 Ellis & Black. 470; 36 Eng. Law & Eq. 221, 227; *The David & Caroline*, 5 Blatchf. 266.

the vessel and safely carry and deliver the goods renders him answerable for the use of all expedient means to that end.¹

§ 597. The carrier must consider the nature of the goods, and must observe the instructions given him, with respect to the mode of placing and carrying fluids, and boxes containing glass, crockery and like articles. He must carry goods in the manner directed, or show that the loss did not happen in consequence of his neglecting to observe the instructions accompanying them.² A box containing a glass bottle filled with the oil of cloves, delivered to a common carrier and marked "glass, with care, this side up," is a sufficient notice of the value and nature of the contents, to charge him for the loss of the oil, occasioned by his disregarding the direction.³ The form of a package often indicates its contents; and when it does not, the shipper should notify the carrier of its contents, so that he may take proper care of the goods.⁴

It is the shipper's business to have the goods properly and securely packed for the voyage; but his failure in this will not relieve the carrier from liability for a loss arising from his failure to use due and reasonable diligence to preserve the goods.⁵ Neither will an exception of leakage or breakage in the bill of lading relieve the carrier from liability for losses thus arising by his negligence or that of his servants; it does not of itself relieve him from the burden of showing how the loss occurred and that he used due care and vigilance.⁶ Having proved a loss within the terms of the exception, with the circumstances, showing that he was not at fault, or consistent with his duty in the premises, he is entitled to the benefit of the stipulation in the contract.⁷ If a cask of wine be shipped under a bill of lading exempting

¹ *Clark v. Barnwell*, 12 How. U. S. 272.

² *Wiltz v. Morrell*, 66 Barb. 511; *Johnson v. N. Y. Central R. R. Co.*, 33 N. Y. 610.

³ *Hastings v. Pepper*, 11 Pick. R. 41.

⁴ *In re Webb*, 6 Scott, N. R. 956.

⁵ *Phillips v. Clark*, 5 C. B. (N. S.) 882; *Nelson v. Woodruff*, 1 Black. 156; 5 Blatchf. 266; *Shriver v. Sioux City & St. Paul R. R. Co.*, 24 Minn. 506.

⁶ *Steele v. Townsend*, 1 Ala. Sel. Cas. 201; 37 Ala. 247; *Reno v. Hogan*, 12 B. Mon. (Ky.) 63; *Zung v. Howland*, 5 Daly, 136. See *Nicholas v. N. Y. C. & H. R. R. Co.*, 4 Hun, 327; 51 N. Y. 61; *Arend v. Liverpool, N. Y. & P. Steamship Co.*, 6 Lansing, 457.

⁷ *R. R. Co. v. Reeves*, 10 Wallace, 176; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *French v. Buffalo R. R. Co.*, 4 Keyes, 198; *Lamb v. Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271, 278; 4 Hun, 327; *Farnham v. Camden, etc., R. R. Co.*, 55 Pa. St. 53. Where the carrier proves a contract exempting him from liability for loss from a specified cause, and that the loss occurred from that cause, the burden is on the plaintiff to show facts taking the case out of the operation of the exemption clause. *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Cochran v. Dinsmore*, 49 N. Y. 252; *Whitworth v. Erie Ry. Co.*, 87 N. Y. 413, 419.

the carrier from loss by leakage, he does not bring himself within the exemption by proving a delivery of the empty cask, in a sound condition; he must prove that the loss occurred by leakage.¹

§ 598. Exemptions from liability in the bill of lading do not, as we have seen, excuse a carrier for a loss, where it appears, or is found as a fact, that his negligence in stowing or carrying the goods occasioned the loss.² If a ship meet with a collision on the voyage, a peril excepted in the bill of lading, wetting the cargo, and the vessel is delayed for repairs, it is the carrier's duty to take active measures, where it is reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting, and likely to result from the accident.³ Being bound to take active measures to preserve the property, the carrier is entitled to recover the reasonable expenses incurred by him in doing so.⁴ He is not bound to delay his voyage unreasonably, and he is bound to use all reasonable means, such as a prudent owner being present would take, to save the property from loss by natural causes.⁵

Inattention to the contents of boxes received by him, and receipted as containing perishable freight, will not relieve him from liability therefor, where his vessel is detained by a fog and he omits to send them forward by rail, a mode of conveyance previously used when his vessel was detained; as where dressed poultry was shipped on a steamboat for New York, packed in ice, and was greatly injured by the delay, the

¹ *Arend v. Liverpool, N. Y. & P. S. Co.*, 6 Lansing, 457. Where a portion of the contents is lost by leakage, the consignee should receive the residue. *Howe v. O. & S. R. R. Co.*, 56 Barb. 121. While it is for the carrier to account for any deficiency in the cargo; *Hawkes v. Smith, Car. & M.* 72; or to show that the damage arose in part from bad packing; *Higginbotham v. Great Northern R. Co.*, 2 F. & F. 796; or to show that a loss by leakage arose from some defect in the cask; *Hudson v. Baxendale*, 2 H. & N. 575; it is to be left to the jury, on the testimony, to find whether the loss arose from defects in the casks, and whether the carriers knew or ought to have known thereof, and had acted negligently in sending them on in that state. *Cox v. London & Northwestern R. Co.*, 3 F. & F. 77.

² *Camoy's v. Scurr*, 9 Carr. & P. 383; *Steamboat Co. v. Bason*, Harp. (S. C.) 262; *Spencer v. Daggett*, 2 Vt. 92; *Jones v. Pitcher*, 1 Stew. & P. (Ala.) 136.

³ *Tronson v. Dent*, 8 Moo. P. C. 419, relating to a cargo of opium; *Notara v. Henderson*, 1 English (Moak), 269; Law Rep. 72, B. 225, relating to a cargo of beans. See also *Chouteaux v. Leach*, 18 Penn. St. 224; *Blocker v. Wittenburg*, 12 La. Ann. 410; *Propeller Niagara v. Cordes*, 21 How. U. S. 7; *Bird v. Cromwell*, 1 Mo. 81. As to delay in receiving goods, see 28 N. Y. 72.

⁴ *Great Northern R. Co. v. Swoffeld*, 8 English (Moak) R. 567; Law Rep. 9 Exch. 132; a horse stabled to wait for the owner.

⁵ *Rogers v. Murray*, 3 Bosw. 357, 365; *Steamboat Lynx v. King*, 12 Mo. 272; *Wing v. N. Y. & Erie Ry. Co.*, 1 Hilton, 235; *Butler v. Murray*, 30 N. Y. 88.

ice melting and leaving the freight to perish by decay.¹ So where on a voyage goods are accidentally wet and thereby exposed to injury, the carrier is bound to use every reasonable means to arrest and prevent the damages likely to result from the accident.² Under the rule as held in some of the States, the carrier may relieve himself of this obligation by a special contract; *not so, under the rule as held in others and sustained by the U. S. Supreme Court.⁴

The carrier is not liable for losses or deterioration resulting from natural causes, or from the nature of the goods, without fault on his part; as where a cargo of vegetables or fruit is injured by natural decay, consequent upon a long voyage or the vessel's delay by reason of being driven under stress of weather out of her course, and detained in a foreign port for repairs; * or where a cargo of lard is greatly diminished by leakage caused by heat in passing through a warm climate;⁶ or where an article like wine or molasses is injured or lost on the voyage by fermentation.⁷ The carrier is not required to answer for losses of this kind, arising from the climate or from the nature of the goods, where his negligence does not contribute to the loss.⁸

Under a contract for the conveyance and delivery of fruit within a

¹ *Peck v. Weeks*, 34 Ct. 145.

² *Bird v. Cromwell*, 1 Mo. 58, 81; *Ewart v. Street*, 2 Bailey (S. C.), 157; *Chouteaux v. Leach*, 6 Harris, 224.

³ *Nicholas v. N. Y. C. & H. R. R. Co.*, 4 Hun, 327; on the authority of *Cragin v. N. Y. Central R. R. Co.*, 51 N. Y. 61. The case in Hun, was reversed by the court of appeals, not on the ground that the carrier could not contract for exemption from liability for want of care, but on the ground that he had failed to so contract. See 83 N. Y. 370.

⁴ *Railway Company v. Lockwood*, 17 Wallace, 366.

⁵ *Ship Howard v. Wessman*, 18 How. U. S. 231; *The Brig Collenberg*, 1 Black (U. S. R.), 170. See *McGraw v. Baltimore & O. R. R. Co.*, 18 W. Va. 361; *American Express Co. v. Smith*, 33 Ohio St. 511.

⁶ *Nelson v. Woodruff*, 1 Black, 156, relates to a loss on a voyage from New Orleans to New York.

⁷ *Warden v. Geer*, 6 Watts, 424; *Farrar v. Adams*, Buller, N. P. See *Nelson v. Stephenson*, 5 Duer, 538.

⁸ It is assumed in *Davidson v. Gwynne*, 12 East, 381, that a carrier is liable for damages to fruit from his neglect of proper ventilation; and the same principle is affirmed in *Clark v. Barnewell*, 12 How. U. S. 272, where a cargo of cotton thread was injured on a warm southern voyage, from dampness or moisture. Ante, §§ 537-542; *Rixford v. Smith*, 52 N. H. 355. It is the carrier's duty to protect the goods carried from injury or destruction from any source if he can do so by the exercise of proper care and foresight. If he accepts butter for transportation he must provide refrigerator or other cars in which ice may be used if necessary to protect the butter from injury from heat. *Beard v. Illinois Cent. R. R. Co.*, 79 Iowa, 518; *Beard v. St. Louis, A. & T. H. R. R. Co.*, 79 Iowa, 527.

given time, the carrier is held to a rigid performance.¹ Unavoidable accidents will not avail him as a defense, under a contract to carry and deliver within so many days :² the rule is not so strict under a general contract to carry and deliver.³

§ 599. The owner or shipper of goods cannot recover of the carrier damages resulting from the imperfect or bad packing of the goods, when delivered for conveyance; and yet the carrier is liable where he might have prevented the damage or loss of the goods by the exercise of reasonable diligence. It is not thought wise to excuse the carrier's negligence on the ground of the shipper's prior negligence, since it often happens that packages and boxes of goods delivered in good condition at the start are injured or broken on the way, and for that very reason require some increased care in their transportation.⁴ Receiving the goods imperfectly packed or secured, the carrier is bound for their safe conveyance.⁵

§ 600. A clause in a bill of lading giving the carrier the privilege of reshipping or transshipping the goods is not interpreted as otherwise modifying or limiting the contract; it is regarded as a privilege conceded to the carrier for the purpose of enabling him to fulfill the contract and deliver the goods at the place of destination.⁶ It takes effect according to its terms, and is limited by its terms.⁷ It does not affect the stipulation fixing the amount of the freight, nor is it usually intended to relieve the carrier from his liability under the contract.⁸

¹ *Place v. Union Ex. Co.*, 2 *Hilton*, 19; *Simpson v. London & Northwestern R. Co.*, 45 *L. J. Q. B. Div.* 182; 1 *L. R. Q. B. Div.* 174.

² *Harmony v. Bingham*, 1 *Duer*, 209; *S. C.* 12 *N. Y.* 99; *Higginson v. Weld*, 14 *Gray*, 465; *Read v. Hudson & Del. Canal Co.*, 3 *Lans.* 213.

³ *Gage v. Terrell*, 9 *Allen*, 299; *Collier v. Swinney*, 16 *Mo.* 484; *Parsons v. Hardy*, 14 *Wend.* 215, 217; 23 *Wend.* 306.

⁴ *Klauber v. American Ex. Co.*, 21 *Wis.* 21; *Nelson v. Stephenson*, 5 *Duer*, 538; loss by leakage; *Brind v. Dale*, 8 *C. & P.* 207; *Rixford v. Smith*, 52 *N. H.* 355; *Ohio & M. R. R. v. Dunbar*, 20 *Ill.* 623; *Brown v. Clayton*, 12 *Ga.* 566; *Pemberton Co. v. N. Y. C. R.*, 104 *Mass.* 144; *Briggs v. Taylor*, 28 *Vt.* 180; *Phillips v. Clark*, 5 *C. & B. (N. S.)* 882; *Hudson v. Baxendale*, 2 *H. & N.* 575; *The David & Caroline*, 5 *Blatchf.* 266; *Barbour v. Southeastern C. Co.*, 34 *L. T. N. S.* 67 *D. C. A.*; *Shriver v. Sioux City & St. Paul R. R. Co.*, 24 *Minn.* 506.

⁵ *Ante*, § 527; *McMillan v. Michigan Southern, etc., R. R. Co.*, 16 *Mich.* 79; *Harmon v. N. Y., etc., R. R. Co.*, 28 *Barb.* 323; *New Brunswick Co. v. Tiers*, 24 *N. J. L. (4 Zab.)* 697.

⁶ *Little v. Semple*, 8 *Mo.* 99; *Whitesides v. Russell*, 8 *Watts & Serg.* 44; *McGregor v. Kilgore*, 6 *Ohio*, 143; *Dunseth v. Wade*, 2 *Scam.* 288.

⁷ *Casillay v. Young*, 4 *B. Mon.* 265; 8 *Bosw.* 213; *Simmons v. Law*, 3 *Keyes*, 217.

⁸ *Broadwell v. Butler*, 6 *McLean*, 296; *Sturgess v. Steamboat Columbus*, 23 *Mo.* 250; *Carr v. Steamboat Michigan*, 27 *Mo.* 196; *Wilson v. Harry*, 32 *Penn. St.* 270; *Hatchett v. Steamer Compromise*, 12 *La. Ann.* 783.

Unless there is a contract, express or implied, to that effect, the carrier is not at liberty to convey the goods by a different route, or by a different ship, or by a different mode of transportation, from that specified in the receipt or bill of lading.¹ When an unforeseen event renders it impossible to fulfill the contract by the conveyance specified, or when the vessel on which the goods are shipped becomes disabled on the voyage, and is driven into a port of necessity where it cannot be repaired within a reasonable time so as to proceed on its way, the carrier is bound to use all proper means to fulfill the contract substantially, and as nearly according to its terms as may be practicable.² If his vessel is so disabled that it cannot proceed on the voyage, it is the duty of the master to reship the goods by another vessel; and where that cannot be done, or where the goods are in such a damaged condition that they cannot be sent forward without subjecting the owner of them to a great loss, the master is justified in selling the goods, acting under an urgent or inevitable necessity.³

Intermediate carriers are sometimes employed to connect different lines of conveyance; being independent carriers, they are liable to the owner for any injury to the goods while under their charge; being employed by the carrier contracting for the safe conveyance of the goods, their engagement is ancillary to his; as where goods are carried in small boats up the rapids of a river, or from the quay to a railroad depot, on a change from water to land carriage. The persons employed in the work are the agents and servants of the carrier, where the transfer is within the scope of his contract.⁴ The policy of the law does not permit the carrier to relieve himself from responsibility by handing the goods over to irresponsible third parties, who are merely aiding him in the transportation.

§ 601. The carrier's implied agreement to furnish a roadworthy coach or a seaworthy vessel is enforced with great steadiness and some severity.⁵ It is his first duty to furnish a sufficient and safe convey-

¹ *Goddard v. Mallory*, 52 Barb. 87; *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514; *Johnson v. N. Y. Central R. R. Co.*, 33 N. Y. 610.

² *Williams v. Vanderbilt*, 28 N. Y. 217; *White v. Mann*, 26 Maine, 361; *Johnson v. N. Y. Cent. R. R. Co.*, 33 N. Y. 610.

³ *Rogers v. Murray*, 3 Bosw. 357; *S. C.* 30 N. Y. 88; *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543; *New Eng. Ins. Co. v. Brig Sarah*, 13 Peters, 387; *Chambers v. Grantzon*, 7 Bosw. 414; *Saltus v. Ocean Ins. Co.*, 12 John. R. 107.

⁴ *Hyde v. Trent & Mersey Nav. Co.*, 5 Term R. 389; *Wardell v. Mowsellyan*, 2 Esp. R. 683; *Garside v. Trent & Mersey Nav. Co.*, 4 Term R. 581; *Jeremy on Car.* 68, 69.

⁵ *Backhouse v. Sneed*, 1 Murph. 173; *Lyon v. Mells*, 5 East, 428; ante, § 551; *Dauchy v. Silliman*, 2 Lans. 361; 4 Alby. L. J. 13.

ance, whether by land or by water.¹ The law implies an engagement on his part that his coach shall be properly constructed and reasonably strong and fit for the work, and that the machinery and appliances used by him in securing or in handling the goods shall be sufficient for the business in which it is employed;² that the vessel employed in the transportation is seaworthy at the commencement of the voyage;³ and well equipped and manned for the voyage.⁴ Unless the vessel is seaworthy when the voyage commences,⁵ the owner of it cannot obtain a valid policy of insurance upon it; there being in the contract of insurance an implied warranty on the part of the owner that the ship shall be seaworthy when the risk commences—that she shall be tight, strong, and in all respects fit for the intended voyage.⁶ For the same reason a shipper cannot obtain a valid policy of insurance upon the goods or cargo shipped by him, unless the vessel is seaworthy and duly equipped and manned with a sufficient number of seamen of competent skill and ability to perform the voyage;⁷ there being an implied warranty on his part also that the ship shall be seaworthy when the voyage commences. Conceding that the implied warranty on the part of the owner of the vessel obliges him to keep her in a seaworthy condition in the succes-

¹ *Philleo v. Sanford*, 17 Texas, 227; *Smith v. New Haven, etc.*, R. R. Co., 12 Allen (Mass.), 531; as applied in favor of passengers, *Hegeman v. Western R. Cor.*, 13 N. Y. 9; *Ingalls v. Bills*, 9 Metcalf R. 1; *Alden v. N. Y. Central R. Co.*, 26 N. Y. 103; *Kopitoff v. Wilson*, 1 Q. B. 377; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; *McPudden v. N. Y. Cent. R. R. Co.*, 44 N. Y. 478.

² *Camden R. & Tr. Co. v. Burke*, 13 Wend. 611, 628; *Frink v. Potter*, 17 Ill. 406; *Redhead v. Midland R.*, Law Rep. 2 Q. B. 412; *Law Rep. 4 Q. B. 379*; *Meir v. Penn. R. R.* 64 Pa. St. 225.

³ *Dickinson v. Haslett*, 3 Harris & J. 345; *Bell v. Reed*, 4 Binn. 127; *Hart v. Allen*, 2 Watts, 114; *Reed v. Dick*, 8 Watts, 480; *Collier v. Valentine*, 11 Mo. 299; *Hollingsworth v. Broderick*, 7 Adolph. & Ellis, 40.

⁴ *Putnam v. Wood*, 3 Mass. 481; *Lyon v. Mells*, 5 East, 428.

⁵ *Howard v. Orient Mut. Ins. Co.*, 2 Robt. 539; 4 Daly, 246.

⁶ *Barnewall v. Church*, 1 Caines' R. 217, 233; *Van Wickle v. Merchants', etc., Ins. Co.*, 97 N. Y. 350; *Allison v. Corn Exchange Ins. Co.*, 57 N. Y. 87; *Talcott v. Com. Ins. Co.*, 2 John. R. 124, 130; the ship must be properly officered and manned; *Draper v. Com. Ins. Co.*, 4 Duer, 234; S. C. 21 N. Y. 378; whether the vessel insured was seaworthy when the voyage commenced is usually a question of fact; *Walsh v. Wash. M. Ins. Co.*, 32 N. Y. 427. The contract of insurance is to be enforced according to its terms; "at and from New York to Havana," covers a continuous risk, and the policy is rendered void by a preliminary trial trip; *Fernandez v. Gt. Western Ins. Co.*, 48 N. Y. 571. See *Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332.

⁷ *Silva v. Low*, 1 John. Cases, 184; *Law v. Hollingsworth*, 7 T. R. 160; *Dixon v. Sadler*, 5 M. & W. 414; S. C. 8 M. & W. 895; *Caddock v. Franklin Ins. Co.*, 11 Pick. R. 227; *Starbuck v. N. Eng. Mar. Ins. Co.*, 19 Pick. 199; *American Ins. Co. v. Ogden*, 20 Wend. 287. A policy of insurance against all marine risks, covers barratry by the master and mariners. *Parkhurst v. Gloucester M. F. Ins. Co.*, 100 Mass. 301.

sive stages of the voyage, as far as practicable, and that the implied warranty by the shipper of goods on the vessel does not bind him so strictly for acts of omission and bad faith on the part of the master not employed by him¹—there is still ample reason for the rule holding the carrier bound to the shipper on an implied warranty that his vessel is seaworthy, in a contract exempting the carrier from liability for the perils of the sea;² and that he will keep her in a seaworthy condition, as far as practicable, on the voyage. Accordingly, we find it well settled that the carrier cannot escape liability for losses, under exemptions in the bill of lading, unless he uses reasonable care to guard against them, and keeps his vessel in good condition, and properly equipped for the voyage.³

§ 602. A railway carrier is responsible for the proper construction of its road, bridges, freight-houses, and depots; and is bound to keep them in a suitable and safe condition for business.⁴ It owes this duty to the public, where its track passes over or along the highway;⁵ and it is quite clear that the duty may be enforced in many situations, under contracts exempting the carrier from liability for specific perils or risks.⁶

¹ *Brioso v. Pacific Mutual Ins. Co.*, 4 Daly, 246; *Redman v. Wilson*, 14 M. & W. 476; *Waters v. Merchants' Ins. Co.*, 11 Peters, 213. In *Howard v. Orient M. Ins. Co.*, 2 Robt. 539, the court, BARBOUR, J., holds that where these facts are found to exist concurrently, the underwriter is exonerated from liability; that is to say: *first*, where the vessel which is, or contains, the subject matter of the insurance leaves an intermediate port, whether a port of call or of distress, in an unseaworthy condition; *second*, where such condition is owing to the gross or culpable negligence of the master; and *third*, where the property insured becomes lost or damaged, because of the particular defect that rendered the vessel unseaworthy, or by some means to which such defect directly contributed. ² *Christy v. Trott*, 25 Eng. Law & Eq. 262.

³ *Hazzard v. New Eng. Ins. Co.*, 1 Sumner, 218; 8 Peters, 557; *Backhouse v. Sneed*, 1 Murph. 173.

⁴ *Birmingham v. Rochester City & B. R. R. Co.*, 59 Hun, 583; *Palmer v. D. & H. C. Co.*, 120 N. Y. 170; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Merwin v. Manhattan Ry. Co.*, 48 Hun, 608; *Requa v. City of Rochester*, 45 N. Y. 129, holds that a municipal corporation is bound to keep its streets in a passable and safe condition. See *Atlantic M. Ins. Co.*, 48 Barb. 27; and *Stedman v. Western Transp. Co.*, 48 Barb. 97, relating to the action against a common carrier of goods; 52 Ill. 106; 53 Ill. 227; 59 Me. 415; *Brehm v. Great Western R. Co.*, 34 Barb. 256; *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534; *Gibson v. Erie R. Co.*, 63 N. Y. 449; 62 N. Y. 99, 251; 59 N. Y. 646.

⁵ *Fash v. Third Avenue R. Co.*, 1 Daly, 148. If a railway company negligently allows a bridge over a highway to become so defective that portions of the bridge fall upon persons passing below, it is liable for the resulting injury. *Kearney v. London, B. & S. C. R. R. Co.*, Law Rep. 6 Q. B. 759.

⁶ *Milton v. Hudson River S. Co.*, 37 N. Y. 210. This duty is enforced strictly in favor of passengers: *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9; *Brown v. N. Y. Central Co.*, 34 N. Y. 404; *Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408. ante, §§ 344, 345.

Under an exemption from losses by fire, a railway carrier could not escape liability for a loss caused by the fall of a badly constructed bridge or by a defective track overturning or breaking up the train and ending in its destruction by fire.¹

A railway carrier must also equip its road with the requisite rolling stock, engines and cars, to satisfy the ordinary demands of its business, so that it may send forward property received for transportation, within a reasonable time. The carrier is bound to procure and employ the requisite facilities;² and must make a diligent use of its facilities and means in carrying forward goods, which are always presumed to be on the way to a market.³

The railway carrier must also use diligence in the management of its engines, its motive power;⁴ and in the running and conduct of its trains, so as to prevent collisions and preserve the property on board against losses and injury from the negligent or bad management of the business.⁴

§ 603. It is proper to observe, in this connection, that carriers by water are responsible for the use of skill and diligence in navigation—a rule of great breadth, embracing infinite particulars relating to the movement of their ships or vessels, directing their course and keeping them in the true channel; and requiring the use of all such precautions and safeguards, to insure a prosperous voyage, as are suggested by science and experience. When the vessel is propelled by steam, a high degree of skill must be used in the management of the boilers and machinery; namely, that degree of skill and vigilance which may be

¹ *Seger v. Town of Barkhamsted*, 22 Ct. 290; 1 Cush. 451. For an injury caused by the derailment of the train resulting from the giving away of rotten ties negligently permitted to remain as a part of the roadbed, *Rutherford v. Shreveport & H. R. R. Co.*, 41 La. Ann. 793, or from a landslide in a cut after an ordinary rain, *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, the company will be liable.

² *Wibert v. New York & Erie R. Co.*, 12 N. Y. 245; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500. See *Harris v. Northern Ind. R. R. Co.*, 20 N. Y. 232; *Tierney v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 305. If having all these facilities he is prevented by mob violence from using them, the carrier is not liable. *Geismer v. L. S. & M. S. R. Co.*, 102 N. Y. 563.

³ *Sjordett v. Hall*, 4 Bing. R. 607. There are many decisions enforcing the duty in actions brought by passengers for personal injuries, and by third parties: *Johnson v. Hudson R. R. Co.*, 20 N. Y. 65; *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534; involving losses to third parties; *Fero v. Buffalo & St. Line R. Co.*, 22 N. Y. 209; *Swarthout v. N. J. Steamboat Co.*, 48 N. Y. 209; *O'Marra v. Hudson River R. R. Co.*, 35 N. Y. 445; 60 N. Y. 133; 49 Ill. 234; 55 Ill. 194; 51 N. Y. 476.

⁴ *Chapman v. N. H. R. R. Co.*, 19 N. Y. 341; 18 N. Y. 534; *Ransom v. N. Y. & Erie R. Co.*, 15 N. Y. 415; *Culhane v. N. Y. C. & H. R. Co.*, 60 N. Y. 133; *Fietal v. Middlesex R. R. Co.*, 109 Mass. 398.

reasonably expected from a competent and prudent engineer.¹ The boiler, used in a vessel employed in navigating the waters of the United States, must be constructed of approved material, examined and certified in compliance with the requirements of the statute;² and it must be entrusted to the care and management of competent men. A failure to comply with the statute law will raise a presumption of negligence against the carrier; and yet a compliance with the terms of the statute will not relieve him from liability for losses imposed upon him by the common law, on the ground of his negligence.³

The carrier is bound to know the channel, and is liable for injuries caused by the stranding or wreck of his vessel upon well-known sand-bars, rocks, shoals and other like obstructions. Carrying goods without any limitation upon his common law liability, he is bound to follow the true channel, even under circumstances of difficulty and danger;⁴ and is liable for the loss ensuing from his failure to do so, unless it can be justly attributed to inevitable accident without human intervention;⁴ as it may be, where, without fault on his part, the vessel is driven by a violent storm on the beach, rocks or shoals.⁵ Entering or leaving a harbor, or on a river, the master not being acquainted with the channel, it is his duty to take a pilot on board, where that is the established law or usage; and if he neglect this means of safety, he must answer for the consequences.⁶ Under the common law, the pilot taken on board becomes the agent of the carrier;⁷ and though it has been questioned whether the carrier, compelled by law to accept a

¹ *Steamboat New World v. King*, 16 How. U. S. 469, asserting the rule in favor of a passenger; also *Caldwell v. New Jersey S. Co.*, 47 N. Y. 282; and *Loop v. Litchfield*, 42 N. Y. 351, an action against the manufacturer.

² R. S. of U. S. 857, 861-866. By the U. S. statute of 1838, § 13, the bursting of a boiler, or the collapse of a flue, or other injurious escape of steam, is *prima facie* evidence to charge the defendant with negligence in an action for injury to property.

³ *Swarthout v. N. J. Steamboat Co.*, 46 Barb. 222; S. C. 48 N. Y. 209; *Caldwell v. N. J. S. Co.*, 56 Barb. 425; 47 N. Y. 282.

⁴ *Elliott v. Russell*, 10 John. R. 1; *McArthur v. Sears*, 21 Wend. 190; *Ross v. English*, 2 Speer, 393; *Boyle v. McLaughlin*, 4 Harris & J. 291.

⁵ This exception is implied in all the cases. *Price v. Hartshorne*, 44 Barb. 655. If the carrier has expressly contracted for exemption from dangers of navigation and unavoidable accident this will cover a loss of goods arising from the vessel striking an unseen obstruction and sinking, if the navigation was in its course according to the usage of the trade. *Hostetter v. Park*, 137 U. S. 30.

⁶ *Williams v. Grant*, 1 Conn. 487; *Fergusson v. Brent*, 12 Md. 9; *McMillan v. U. Ins. Co.*, 1 Rice, 248; *Keeler v. Fireman's Ins. Co.*, 3 Hill, 250; *The William*, 6 Rob. Adm. 316; State laws on the subject valid; *Cisco v. Roberts*, 36 N. Y. 292.

⁷ *Yates v. Brown*, 8 Pick. 23; *Williamson v. Price*, 16 Martin La. 399; *Snell v. Rich*, 1 John. 305; *Denison v. Seymour*, 9 Wend. 9. See *Atty. Gen. v. Case*, 3 Price, 302; *Mackintosh v. Slade*, 6 B. & C. 657.

licensed pilot, is answerable for his acts, it is quite clear that the carrier is bound to follow the course usually pursued by skillful pilots in passing a bar or dangerous place on the river. He is responsible for the skillful navigation of the vessel.¹

§ 604. Does the exception cover the loss? A common carrier is responsible for the goods entrusted to him, unless the same are lost or damaged by agencies for which the law does not hold him answerable, or by means for which the contract does not hold him bound. The goods having been lost or destroyed, under circumstances not bringing the loss under either of the exceptions created by law, the carrier is liable for them unless he shows that the loss was caused by dangers or perils for which he did not become answerable; in other words, after a loss is shown, the next inquiry is, whether it comes under the terms of exception contained in the contract.² And unless it does come within the exception, the carrier is liable. We have already considered many of these exceptions, and the effect of them, in the carrier's contract.³

§ 605. On the axiom that the greater includes the less, the carrier is liable for all losses by thefts committed by strangers, and for embezzlement by the master or crew.⁴ It is not necessary to show that the carrier was himself guilty of negligence; he engages for the safety of the goods, against force, violence and fraud;⁵ and he is liable for them when, being provisions, they are consumed by the passengers, as the only means of subsistence left to them on a prolonged voyage.⁶ On account of his liability for losses by the misconduct and fraud of the master, the ship-carrier is allowed to obtain an insurance on the vessel and cargo against losses by thieves or by the barratry of the master, or the master and crew; and the underwriters must then answer for their

¹ *Collier v. Valentine*, 11 Mo. 299, 310; *Ready v. Steamboat Highland Mary*, 17 Mo. 461. Although the law of this State compels the master of a vessel to take a pilot, this fact does not exonerate the vessel from liability for damages for a collision which was entirely the result of the gross mismanagement of the pilot. *The China*, 74 U. S. 53.

² *Watkinson v. Laughton*, 8 John. 213; *Merritt v. Earle*, 31 Barb. 38; S. C. 29 N. Y. 115; 52 Barb. 489; 45 N. Y. 514; 12 N. Y. 99; 48 N. Y. 655; ante, § 597.

³ An insurance company having paid a loss by fire, on goods in a carrier's hands without any contract of exemption, may recover of the carrier; *Ætna Ins. Co. v. Wheeler*, 5 Lans. 480; S. C. 49 N. Y. 616; ante, §§ 552-568, 586-590.

⁴ *Schieffelin v. Harvey*, 6 John. 107; *Morse v. Slue*, 1 Vent. 190, 238; *Ely v. Ehle*, 3 N. Y. 506, 509.

⁵ *Forward v. Pittard*, 1 T. R. 27; *Barclay v. Cuculla y Gana*, 3 Douglas, 389; *Watkinson v. Laughton*, 8 John. 213; ante, § 547.

⁶ *Moses v. Sun M. Ins. Co.* 1 Duer, 159.

thefts and pilferings, and for thefts by outside parties, under this most remarkable contract of moral insurance.¹

§ 606. When a common carrier, *e. g.*, an express company, receives goods to carry from one city to another and is paid the freight for the entire distance, and itself contracts with other carriers for the transportation of the goods in bulk, and sends its own agent in charge of the goods, the actual carriers furnishing the conveyance are liable to the owner for losses resulting from a failure in due care and diligence, or from wrongful acts committed by themselves or by their agents and servants; but the owner, having agreed with and delivered the goods to the express company, can only recover against the carrier employed by it, in virtue of and upon the contract between the two companies.² The express company under this contract for the conveyance and delivery of the goods is more than a forwarder;³ it is a common carrier;⁴ and its contract does not usually specify the route or mode of conveyance, but leaves the company free to fulfill its agreement in the usual manner.⁵

§ 607. It sometimes happens that a common carrier is intrusted with some agency relating to the goods carried by him; as where he is to carry the goods to market and sell them and bring back the proceeds, the freight covering the whole service. Here he is liable for the money as a carrier, on the return trip, and from the time he receives it.⁶ When the master of a vessel is made the consignee of a cargo for sale and returns, the ship-owners receiving the freight, and the master commissions for his trouble, the master acts as the agent of two distinct principals; namely, as the agent of the ship-owners in stowing, carrying and delivering the goods, and as the agent of the shipper in making sales and returns.⁷ It depends upon the understanding of the parties, or upon the general custom, whether the master is to be considered as acting for himself or for the owners of the vessel. Charged by the bill of lading with the duty to collect back freight, on delivering goods, the

¹ Kendrick v. Delafield, 2 Caines, 67; Amer. Ins. Co. of N. Y. v. Bryan, 1 Hill, 25; S. C. 26 Wend. 563; Ante, § 589; Atkinson v. Great Western Ins. Co., 65 N. Y. 531.

² Stoddard v. Long Island R. Co., 5 Sandf. 180; Merchants' Bank of Boston v. N. J. Steam Nav. Co., 6 How. U. S. 344; Merrick v. Brainard, 38 Barb. 574.

³ The express company may act as a mere forwarder. Goodrich v. Thompson, 4 Robt. 75; S. C. 44 N. Y. 324.

⁴ Belger v. Dinsmore, 51 N. Y. 166.

⁵ See White v. Ashton, 51 N. Y. 280.

⁶ Kemp v. Coughtry, 11 John. R. 107.

⁷ Williams v. Nichols, 13 Wend. 58. See also Labar v. Taber, 35 Barb. 305.

owners of the vessel are liable for his neglect.¹ The general custom justifies a forwarder, as it does one carrier receiving goods from another, in advancing the freight already earned and collecting the whole freight on delivery of the goods to the consignee.¹

When a carrier, an express company, receives a package of goods with instructions to collect, or marked C. O. D., specifying the amount in money, it assumes the duty of carrying and delivering the goods and collecting the amount specified; it acts as a common carrier;² it discharges its duty in the same manner as other carriers;² and it assumes the further duty of collecting the money pursuant to the order endorsed upon the package.³ Receiving notes and bills of exchange for conveyance, and for collection at a distant point by suit, the company must fulfill the terms of the entire contract; it must follow the directions received with the securities, and have them put in suit without delay.⁴ It is liable as a collecting agent.⁵

§ 608. We have alluded to the carrier's duty to carry forward the goods received by him, with diligence and dispatch. By implication of law and without any special agreement on the subject, he is bound to transport and deliver the goods within a reasonable time. What shall be deemed reasonable time must evidently depend very much upon the circumstances of the case, and the causes interrupting the voyage or delaying the arrival of the carrier. The freezing of the river, or of the canals, may delay him until the opening of the navigation in the spring. Stress of weather may compel him to stop by the way for repairs. An embargo may suspend his duty until it is removed by some act of government. If he carries by rail, an incendiary may burn down a bridge, a mob may tear up the tracks, or disable the rolling stock or interpose irresistible force or overpowering intimidation. In these and like cases the carrier is excused for the reasonable and necessary delay to which he is subjected; he is not discharged from his duty as a carrier; but the only duty resting upon him under the circumstances is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.⁶

¹ Lee v. Salter, Hill and Denio, 163; Davison v. City Bank, 57 N. Y. 81, and cases there cited. Monteith v. Kirkpatrick, 3 Blatchf. 279; Bissel v. Price, 16 Ill. 408; 37 Barb. 236. The course of business, *i. e.* a general custom, is considered in determining the contract or understanding of the parties; Cooper v. Kane, 19 Wend. 386; Dawson v. Kittle, 4 Hill, 107.

² Weed v. Barney, 45 N. Y. 344; Van Winkle v. Adams Ex. Co., 3 Robt. 59.

³ Collender v. Dinsmore, 55 N. Y. 200; Tooker v. Gormer, 2 Hill, 71.

⁴ Palmer v. Holland, 51 N. Y. 416; Frank v. Adams Ex. Co., 18 La. Ann. 279.

⁵ Holt v. Ross, 54 N. Y. 472.

⁶ Geismer v. Lake Shore & Mich. S. Ry. Co., 102 N. Y. 563; Wibert v. N. Y. & E.

Being arrested by the ice without any fault on his part, he is bound on the opening of the navigation to proceed with diligence to complete the transportation and deliver the goods.¹ Being arrested by an embargo or delayed by some act of government, suspending but not dissolving the contract, his duty revives as soon as the cause of the interruption is removed; and he must fulfill the contract.² If his vessel be injured by the perils of the sea, and remain capable of being made seaworthy within a reasonable time, he is bound to repair and proceed on his voyage with no unnecessary delay.³

An interruption of the navigation by freshets or by low water will excuse delay, under the usual or implied contract, so long as it continues; and it will not excuse a delay where the contract prescribes the time for the transportation and delivery of the goods.⁴

In the absence of any agreement fixing the time within which the goods are to be carried forward, the carrier is entitled to what may be deemed a fair and reasonable time, considering the usual course of the business,⁵ and the actual circumstances existing at the time the property is received for transportation.⁵ There being no cause for delay, it must be sent forward presently, with all reasonable expedition.⁶

R. R. Co., 12 N. Y. 245; *Conger v. Hudson River R. R. Co.*, 6 Duer, 375. If the goods are to be transported by water, and on account of the state of the river cannot be taken at once by that means to their destination, the carrier is not bound to forward them by land, and is not liable for the delay if he has exercised due diligence and the goods ultimately arrive safely. *Silver v. Hale*, 2 Mo. App. 557. If the goods are to be carried by rail, and a flood has carried away a bridge on his line, he is not bound to seek another route, but only to use due diligence in getting the goods past the obstruction. *American Express Co. v. Smith*, 33 Ohio St. 511. If perishable goods are being carried by steamer to a distant port and from any cause the machinery becomes disabled during the voyage so as to prevent further progress by steam, it becomes a question of fact whether, under all the circumstances, considering the character of the remainder of the cargo, the direction of the winds, the relative distance from the port of departure and destination, the carrier is justified in completing the voyage by sail instead of returning to the place of departure. *Sherman v. Inman Steamship Co.*, 26 Hun, 107.

¹ *Bowman v. Teall*, 23 Wend. 306; *Parsons v. Hardy*, 14 Wend. 215; *Wallace v. Vigus*, 4 Blackf. R. 260.

² *Hadley v. Clark*, 8 Term R. 259; *Evans v. Hutton*, 5 Scott's New R. 670; *Palmer v. Lorillard*, 16 John. 348.

³ *Herbert v. Hallett*, 3 John. Cases, 93. 538.

⁴ *Wallace v. Vigus*, 4 Blackf. (Ind.), 260; *Harmony v. Bingham*, 12 N. Y. 99. The principle is the same as it is where the navigation is interrupted by the freezing of the canals or rivers: *Parsons v. Hardy*, supra; and *Bowman v. Teall*, supra; or by delays in transportation over connecting roads. *Pereira v. Cent. Pacific R. R. Co.*, 66 Cal. 92.

⁵ *Stedman v. Western Transp. Co.*, 48 Barb. 97; ante, § 602; *Raphael v. Pickford*, 6 Scott's New R. 478.

⁶ *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 245; *Michaels v. N. Y. Central R. R.*

§ 609. The carrier receiving goods, with orders to ship immediately, is answerable for them from the time of their receipt; ¹ and pending any necessary delay. ² Does his agreement to carry and deliver without delay increase his liability? It would seem not, since that is no more than a promise to fulfill the duty imposed upon him by law. ³ And yet the carrier may bind himself by a special contract to carry forward the goods at once, or by a specified train, or within so many days, or in specified cars: ⁴ while independent of a special agreement, the carrier is not bound to use extraordinary efforts to send forward the goods, or to incur extra expense in order to send them forward. ⁵ He discharges his duty by sending them forward in their regular order; ⁶ giving a preference to perishable goods, like fruit and vegetables. ⁷

The carrier is not liable for damages arising from a delay caused by an extraordinary accumulation of freight, or by a railroad collision without fault on his part, or by the negligence of another company having the right of way. ⁸ And he is liable for a delay caused by his own negligence, or failure in duty, or by the negligence or wrongful acts of his agents and servants; as where he makes a contract to carry goods without having the facilities to do so, or where the transportation is delayed by a *strike* among the engineers on the road. ⁹

Co., 30 N. Y. 564; Read v. Spaulding, 30 N. Y. 630; Raphael v. Pickford, 2 D. N. S. 916; 5 M. & G. 551; 6 Scott's N. R. 478; Hales v. London & Northwestern R. Co., 4 B. & S. 66; Ormsby v. Union Pacific Ry. Co., 2 McCrary, C. Ct. 48; Zinn v. N. J. Steamboat Co., 49 N. Y. 442, 444.

¹ Clark v. Needles, 25 Penn. St. 338; O'Neil v. N. Y. & H. R. R. Co., 60 N. Y. 138.

² Western, etc., Co. v. Newhall, 24 Ill. 466.

³ Price v. Hartshorn, 44 Barb. 655, 666; S. C. 41 N. Y. 94, 99; Ward v. N. Y. Cent. R. R. Co., 47 N. Y. 29, 33.

⁴ Pickford v. Grand Junction R. Co., 12 M. & W. 766; Harris v. Northern Ind. R. R. Co., 20 N. Y. 232; Harmony v. Bingham, 12 N. Y. 99; Beebe v. Johnson, 19 Wend. 500; 47 N. Y. 525.

⁵ Briddon v. Great Northern R. Co., 28 L. J. Exch. 51; 32 L. T. 94.

⁶ Acheson v. N. Y. C. & H. R. R. Co., 61 N. Y. 652.

⁷ Marshall v. N. Y. Central R. Co., 45 Barb. 502; S. C. 48 N. Y. 660; Peet v. Chicago, etc., Ry. Co., 20 Wis. 594; Tierney v. N. Y. C. & H. R. R. R. Co., 76 N. Y. 305.

⁸ Taylor v. Great Northern R. Co., 14 L. T. N. S. 363; 1 L. R. C. P. 385; Conger v. Hudson River R. Co., 6 Duer, 375; 61 N. Y. 652.

⁹ Condict v. Grand Trunk R. Co., 54 N. Y. 500; S. C. 4 Lans. 106; Blackstock v. N. Y. & Erie R. Co., 20 N. Y. 48. In this case the employees of the defendant merely refused to discharge their duties or to work, or had suddenly abandoned the defendants' service, offering no violence and causing no forcible obstruction to its business. But where the delay does not come from the strike, that is, from the refusal of the employees to work, but from their violent and unlawful conduct after the strike in preventing other employees from working, the delay is excused. Geismer v. Lake Shore & Mich. S. Ry. Co., 102 N. Y. 563; Pittsburgh & C. R. R. Co. v. Hogan, 84 Ill. 36; Pittsburgh, C. W. L. Ry. Co. v. Hallowell, 65 Ind. 188; Bennet v. L. S. & M. S.

§ 610. On a total failure to deliver, the carrier is *prima facie* liable for the market price of the goods at the time and place for delivery, deducting the freight to be paid for the transportation.¹ Nothing less will cover the damages sustained by the shipper; and where the goods have a market value at the place of destination, the rule is very plain and easy of application; it gives the shipper the value of his property at the place where the carrier agreed to deliver it, with interest from the time for delivery, less the freight due to the carrier under the contract.² A modification of the rule has been allowed, where the goods are lost before the ship sails, or soon after, without fault on the part of the carrier, fixing the damages at the value of the goods at the place where the loss occurs.³

What is the measure of damages against a carrier for his delay in sending forward the goods; *e. g.*, where he negligently delays to carry them forward, and the market in the meantime falls? The measure of damages here is the difference between the value of the goods at the place of destination when they ought to have been delivered and when they were delivered. By his delay the carrier prevents a sale of the goods, and where he does this negligently it is only just that he should pay the difference between the market price at which the owner might have sold his goods, had he received them in due time, and the lower price at which he was compelled by the delay to sell them.⁴ The rea-

R. R. Co., 6 Am. & Eng. R. Cas. 391; I. & W. L. R. R. Co. v. Juntzen, 10 *Bardwell*, 295; *Little v. Fargo*, 43 *Hun*, 233; *Missouri P. Ry. Co. v. Levi*, 14 *Southwestern Rep'r*, 1062.

¹ *Bracket v. McNair*, 14 *John. R.* 170; *O'Hanlon v. North R. R. Co.*, 6 *Best & Smith*, 484. See *Griffin v. Colver*, 16 *N. Y.* 489; in point exactly; *Sturgess v. Bissel*, 46 *N. Y.* 462; *Spring v. Haskell*, 4 *Allen*, 112; *McGregor v. Kilgore*, 6 *Ohio*, 358; *Laurent v. Vaughan*, 30 *Vt.* 90.

² *Van Winkle v. U. S. M. Steamship Co.*, 37 *Barb.* 122; *Cushing v. Wells, Fargo & Co.*, 98 *Mass.* 550; *King v. Shepherd*, 3 *Story*, 349; *Michigan S. & N. I. R. R. Co. v. Caster*, 13 *Ind.* 164; *Rice v. Ontario Steamboat Co.*, 56 *Barb.* 584; *Bridgman v. Steamboat Emily*, 18 *Iowa*, 509; *Thomas, etc., Manuf. Co. v. Wabash, etc., Ry. Co.*, 62 *Wis.* 642; *Nudd v. Wells*, 11 *Wis.* 407; *The Nith*, 36 *Fed. Rep.* 86.

³ *Lakeman v. Grinnell*, 5 *Bosw.* 625.

⁴ *Ward v. N. Y. Central R. R. Co.*, 47 *N. Y.* 29; *Cutting v. Grand Trunk R. R. Co.*, 13 *Allen*, 381; *Sisson v. C. & T. R. R. Co.*, 14 *Mich.* 489; *Collard v. S. E. R. Co.*, 7 *Hurl. & N. Y.* 79; *Wilson v. Lancashire & York R. Co.*, 99 *Eng. C. L.* 632; *Laurent v. Vaughan*, 30 *Vt.* 90; *Peet v. Chicago & N. R. R. Co.*, 20 *Wis.* 594; *Sherman v. Hudson River R. R. Co.*, 64 *N. Y.* 254; *East Tenn., etc., R. R. Co. v. Hale*, 85 *Tenn.* 69; *Atlanta, etc., R. R. Co. v. Texas Grate Co.*, 81 *Ga.* 602; *East Tenn., etc., R. R. Co. v. Johnson*, 85 *Ga.* 497; *St. Louis, etc., Ry. Co. v. Phelps*, 46 *Ark.* 485; *Devereux v. Backley*, 31 *Ohio St.* 16. The rule justly applies where the goods are on their way to a market, and the owner loses in consequence of the delay. *Ingledeu v. Northern R. R. Co.*, 7 *Gray (Mass.)*, 86; *Wilson v. Lancashire & Y. R. Co.*, 9 *C. B. N. S.* 632; *Scott v. Boston & N. O. Steamship Co.*, 106 *Mass.* 468. The owner or

son of the rule becomes more apparent, if not more just, where the owner of the goods makes a sale of them, deliverable provided they arrive in due course, and loses the sale by the carrier's inexcusable delay;¹ or finally receives the property injured or depreciated by the delay.²

The carrier's failure to transport and deliver within a reasonable time is a breach of contract; it is not a conversion, and it is not equivalent to a conversion of the goods;³ the owner cannot therefore refuse to receive them on account of the inexcusable delay, and recover their full value;⁴ unless the delay or negligence results in a loss of the goods,⁵ or destroys their nature and value.⁶

The carrier is held liable for damages caused by his delay in carrying and delivering a part of the machinery for a mill, whereby the mill is compelled to stand idle; or for his delay in delivering goods that are under a contract of sale; where he receives the goods or chattels with knowledge of the contract, or purpose for which they are to be used. He is bound to pay the damages caused by his delay with knowledge of the circumstances,⁷ including the rental value of the mill that stands idle by the delay, and the loss on the defeated sale.⁸

shipper of the goods must be indemnified for the injury he sustains by the delay—the natural and proximate injury arising from the inexcusable delay. *Hales v. London & Northwestern R. Co.*, 4 B. & S. 66; *Benson v. N. J. R. & Tr. Co.*, 9 Bosw. 412; *Black v. Baxendale*, 1 Exch. 410. Notice to the carrier that the goods are sent to meet the demands of a market or of a business that will not bear delay, may affect the amount of the damages; since the carrier's delay may require some new disposition to be made of the goods. *Black v. Baxendale*, supra, 4 B. & S. 66; *St. Louis, etc., Ry. Co. v. Mudford*, 48 Ark. 502. If after such notice the carrier agrees to furnish cars to be loaded in time to be forwarded to such market by a day specified and fails to perform his contract, he is liable for such special damages as result from a failure to get the goods to market on that day. *Hamilton v. Western N. C. R. R. Co.*, 96 N. C. 398. A delay in carrying and delivering a model, for which a prize has been offered, so as to deprive the shipper of it of his chance to obtain the prize, subjects the carrier to the cost of making the model, and it is thought he ought also to compensate the shipper for his loss of the chance thus taken from him. *Watson v. Ambergate N. & B. R.* 15 Jur. 448; *Adams Ex. Co. v. Egbert*, 36 Penn. St. 360.

¹ *Deming v. Grand Trunk R. Co.*, 48 N. H. 455.

² *Ill. Central R. R. v. McClellan*, 54 Ill. 58.

³ *St. Louis, etc., Ry. Co. v. Mudford*, 44 Ark. 439.

⁴ *Scovill v. Griffith*, 12 N. Y. 509; *Hawkins v. Hoffman*, 6 Ill. 586.

⁵ *Ellis v. Turner*, 8 Term R. 531; *Fouldes v. Willoughby*, 8 Mees. & Wels. 540.

⁶ *Smith v. Griffith*, 3 Hill, 333, mulberry trees; *Kent v. Hudson R. R. Co.*, 22 Barb. 278; *Hackett v. Boston, etc., R. R. Co.*, 35 N. H. 390; *Galt v. Archer*, 7 Gratt. (Va.) 307; *Shaw v. S. R. Co.*, 5 Rich. (S. C.) 462.

⁷ *Hadley v. Baxendale*, 9 Exch. 341; *S. C.* 26 Eng. Law & Eq. 398; *Fletcher v. Tayleur*, 17 C. B. 21; *Davis v. C. H. & D. R. R. Co.*, 1 Disney, 23; *Priestly v. Northern Ind. & C. R. Co.*, 26 Ill. 205; *Ill. Cent. R. Co. v. McClellan*, 54 Ill. 58.

⁸ See leading case of *Griffin v. Colver*, 16 N. Y. 480.

§ 611. The mode of proving a loss or damage by the carrier's unreasonable delay must depend upon the circumstances. A total failure to deliver is easily proved, by showing that the goods have not been received.¹ A long delay may also be proved, with equal facility.² An unusual or unnecessary delay may sometimes be proved by showing the distance, the mode and course of business, and the time usually consumed in carrying goods over the route.³ The effect of the proof may also depend upon various circumstances; such as the nature of the property, the season of the year, or the state of the market.⁴

§ 612. When it becomes necessary in a storm at sea to lighten the ship, by throwing overboard a part of her lading, the necessity excuses the act; the carrier, as such, is not liable for the loss, but is bound, in common with the others whose property has been thereby saved from destruction, to contribute to the loss.⁵ The mode of ascertaining the amount of each person's contribution varies in different countries; it is usually done upon the ship's arrival at the port of discharge, by ascertaining the net value of the ship, freight and cargo, as if nothing had been lost; these are to be valued at the price they would fetch at the port of discharge, and the net amount, after deducting all charges, is the sum which is subject to the contribution. If a part of the apparel or tackle of the ship is sacrificed for the common benefit and safety, it is to be included in the loss for which compensation is to be made. As to the goods and property lost, the practice is to estimate them, as well as those saved, at the price they would have brought at the port of discharge on the ship's arrival there, deducting freight thereon. Upon this footing a general average is made, so as to give to the owner of the property sacrificed for the general safety an amount *pro rata* equal to that realized by the owners of the residue saved.⁶

¹ Woodbury v. Frink, 14 Ill. 279; Tucker v. Cracklin, 2 Stark. 275; Griffith v. Lee, 1 C. & P. 110; Mayhew v. Nelson, 6 C. & P. 58.

² Nudd v. Wells, 11 Wis. 407; Western, etc., Co. v. Newhall, 24 Ill. 466.

³ Michigan, etc., R. R. Co. v. Day, 20 Ill. 375; Acheson v. N. Y. C. & Hudson R. Co., 61 N. Y. 652.

⁴ Keeney v. Grand Trunk R. Co., 47 N. Y. 525; S. C. 59 Barb. 104; 48 N. Y. 660; 30 N. Y. 564, 630; Falvey v. Northern, etc., Co., 15 Wis. 129; 30 Vt. 90.

⁵ Ante, §§ 537, 596. The requisites for a general average charge are (1) some peril common to ship and cargo, (2) some sacrifice or expense voluntarily incurred by one part interest for the safety of the whole beyond that chargeable to it by law, and (3) success. Bowering v. Theband, 42 Fed. Rep. 774; Bernard v. Adams, 10 How. (U. S.) 270. One whose negligence has made the sacrifice necessary cannot claim contribution. Snow v. Perkins, 39 Fed. Rep. 334; Phipps v. The Nicanor, 44 Fed. Rep. 504. Sacrifices incurred where there was no peril do not give a right to contribution. The Star of Hope, 9 Wallace, 203.

⁶ Strong v. N. Y. Firemen Ins. Co., 11 John. R. 323, 332. The rule applies so as to

When a general average is fairly settled in a foreign port, and the insured is obliged to pay his proportion of it, he may recover the amount from the insurer, though the average may have been settled differently abroad from what it would have been in the home port.¹ The situation does not admit of any delay; it is the master's duty to have an adjustment made upon his arrival at the port of destination, and upon its being completed he has a lien upon the cargo to enforce the payment of the contribution.²

§ 613. A common carrier does not in form undertake to answer for the fraud or for the wrongful acts of third persons; but his engagement for the safe conveyance and delivery of goods sometimes obliges him to answer for them notwithstanding a loss by the fraud, or by the tortious acts of third parties; as where the goods are obtained from him by the use of false pretenses;³ or where the goods are injured by the negligence of a third party employed to assist in the transportation;⁴ or where they are illegally and wrongfully seized by a public officer;⁵ or where an officer unlawfully prevents him from fulfilling his contract.⁶ The carrier in these cases has a right of action against the wrong-doer, and may recover the damages sustained by him; he may bring his action before he has paid the loss;⁷ or may pay for the property and recover its value of the party wrongfully taking or detaining it.⁸ The law gives him the action on account of his liability under the contract.

On the same ground, and on account of his claims for advances and

cover an injury to a part of the cargo caused in cutting away the mast; *Maggrath v. Church*, 1 Caines' R. 196, 214; as to freight not earned, see *Hathaway v. Sun M. Ins. Co.*, 8 Bosw. 33, 74; as to a stranding of the vessel with a view to save her, see *Bradhurst v. Col. Ins. Co.*, 9 John. R. 9; and *Columbia Ins. Co. v. Ashby*, 13 Peters, 331; *Marshall v. Garner*, 6 Barb. 394; ante, §§ 537, 596.

¹ *Depau v. Ocean Ins. Co.*, 5 Cowen R. 63.

² *Walpole v. Ewen*, Park on Ins. 565, 566; 11 John. R. 336.

³ *Powell v. Myers*, 26 Wend. 591; *Stephenson v. Hart*, 4 Bing. 476; *Price v. Oswego & S. R. Co.*, 50 N. Y. 213. See *Houston, etc., Ry. Co. v. Adams*, 49 Texas, 748; *McEntee v. N. J. Steamboat Co.*, 45 N. Y. 34; *Southern Express Co. v. Van Meter*, 17 Fla. 783. The carrier is liable for an unexplained non-delivery. *Dexter v. S., B. & N. Y. R. Co.*, 42 N. Y. 326.

⁴ *Merrick v. Brainard*, 38 Barb. 574, reversed on other grounds in the Court of Appeals; 34 N. Y. 208; *White v. Bascom*, 28 Vt. 268; *Steamboat Farmer v. McCraw*, 26 Ala. 189.

⁵ *Goslin v. Higgins*, 1 Campb. 451; *Edwards v. White Line Transit Co.*, 104 Mass. 159; *Bennett v. American Express Co.*, 83 Me. 236.

⁶ *Evans v. Hutton*, 5 Scott, N. R. 670; *Rowland v. Miln*, 2 Hilton, 150.

⁷ *White v. Bascom*, supra.

⁸ *Hudson River R. R. Co. v. Lounsbury*, 25 Barb. 597. The carrier may return money received on a parcel marked C. O. D., the transaction turning out a fraud. *Herrick v. Gallagher*, 60 Barb. 566.

freight, the carrier has an insurable interest in the goods in his hands, and may get them insured or may bargain for the benefit of an existing policy on the property; to the extent of the fair value of the property.¹ Unless he limits his liability, the carrier is himself an insurer of the goods received by him for transportation; and hence a company that insures the owner against loss on the goods and pays the same may recover the amount of the carrier.² The law subrogates the insurer into the position and rights of the shipper.³

§ 614. When a carrier brings an action against a third party for the wrongful taking or detention or conversion of goods that were bailed to him for transportation, he recovers the property in replevin, or the value of the property in an action of trover;⁴ and when he brings an action in the nature of trover against the general owner, based on his lien or special property in the goods, he recovers only to the extent of his special interest; he recovers what belongs to him, and no more.⁵ But where a consignee obtains possession of the goods by a false and fraudulent promise to pay the freight as soon as the delivery is complete, the delivery is voidable, and the carrier may maintain an action of replevin for the goods.⁶

¹ *Mercantile M. Ins. Co. v. Calebs*, 20 N. Y. 173; *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; 3 Sumner, 140; *Chase v. Washington Marine Ins. Co.*, 12 Barb. 595; *Deforest v. Fulton Ins. Co.*, 1 Hall, 84; *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312.

² *Ætna Ins. Co. v. Wheeler*, 5 Lans. 480; S. C. 49 N. Y. 616.

³ *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382; *Home Ins. Co. v. Northwestern Packet Co.*, 32 Iowa, 223. This right of subrogation is only a derivative one, and comes solely from the assured, and can only be enforced in his right. If the assured has no right which he can transfer to the insurer, then the insurer can have no subrogation, and cannot take the place of the assured for the purpose of enforcing the liability of the wrong-doer for the loss. Hence, if by the contract between the owner of goods and the carrier, the latter was to have the benefit of the insurance taken out by the former, and the insurer has paid to the owner the entire loss sustained by him arising from a destruction of the goods while in the custody of the carrier, and has taken an assignment of the owner's claim against the carrier, there is no right of subrogation, and no right of action by the insurer against the carrier. *Platt v. Richmond, York River & Chesapeake R. R. Co.*, 108 N. Y. 358; *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312.

⁴ *Greene v. Clark*, 12 N. Y. 343; *Young v. Kimball*, 23 Penn. St. 193; *Waterman v. Robinson*, 5 Mass. 303; *Propeller Commerce*, 1 Black. 574; *Hagerstown Bank v. Adams Ex. Co.*, 45 Penn. St. 419, bank bills destroyed; *Buck v. Remsen*, 34 N. Y. 383.

⁵ *Van Bokkelen v. Ingersoll*, 5 Wend. 315. See *Wheeler v. McFarland*, 19 Wend. 313; 40 N. Y. 557; *Parish v. Wheeler*, 22 N. Y. 494; *Alt v. Weidenburg*, 6 Bosw. 176; *Kissam v. Roberts*, 6 Bosw. 154.

⁶ *Bigelow v. Heaton*, 6 Hill, 43; S. C. 4 Denio, 498; *Golding v. Shea*, 103 Mass. 360.

The contract between the shipper and the carrier of goods gives rise to some important rules of law and rules of evidence. In the first place, the contract, being made in writing, cannot be varied by parol evidence.¹ In the second place, the carrier derives his right to the custody and possession of the goods from the shipper, and cannot therefore on his own account dispute the title of his bailor, to whom he stands in a relation like that of a tenant to his landlord:—a rule which applies in all cases where the bailee seeks to avail himself of the title of a third person for the purpose of keeping the property himself, and to all cases where the bailee has not yielded to a paramount title in another;² and does not apply where the property has been taken from the carrier or bailee by due process of law, or where the bailee has surrendered it to the true owner on demand.³ The contract of bailment is strong *prima facie* evidence of the bailor's title, and it is not conclusive.⁴ If goods be taken from a carrier by due process of law, it is his duty to give his bailor immediate notice of such taking.⁵ And if the bailee in a proper action is compelled to pay for the property to a party having the true title, he cannot be held answerable for it again to his bailor, who was duly notified of the suit.⁶

It is a matter of discretion with the bailee, whether he will stand upon the title of his bailor or yield to the newly asserted and paramount

¹ *Hinckley v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 429; *Long v. N. Y. C. R. R.*, 50 N. Y. 76; 11 Cush. 102; *White v. Ashton*, 51 N. Y. 280; *Germania Fire Ins. Co. v. Memphis & Charleston R. R. Co.*, 72 N. Y. 90; *Hill v. Syracuse, Binghamton & N. Y. R. R. Co.*, 73 N. Y. 351.

² *Goslin v. Birnie*, 7 Bing. 339; *Hall v. Griffin*, 10 Bing. 246; *Benton v. Wilkinson*, 18 Vt. 186.

³ *Bates v. Stanton*, 1 Duer, 79; *Hardman v. Wilcock*, 9 Bing. R. 382; *King v. Richards*, 6 Whart. 418; *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Biddle v. Bend*, 6 Best & Smith, 224; ante, §§ 353, 362. That the property was taken from the possession of the carrier by one having title paramount to that of the consignor is a good defense to an action by the consignee or indorsee of the bill of lading for a non-delivery of the property. See *Nat. Bank of Commerce v. Chicago, B. & N. R. R. Co.*, 44 Minn. 224, 236.

That the taking of the property from the possession of the carrier by due process of law is a good defense to an action by the consignor for non-delivery, see *McVeagh v. Atchison, T. & S. F. R. R. Co.*, 3 N. M. 205; *Jewett v. Olsen*, 18 Oregon, 419; *Livingston v. Miller*, 48 Hun, 232.

⁴ *Berkley v. Watling*, 7 Adol. & Ellis, 29; *Barrett v. Rogers*, 7 Mass. 297; *Md. Ins. Co. v. Ruden*, 6 Cranch, 338. If the carrier does not know the ownership of the property and the consignment is unqualified, he has the right to assume that the consignee is the owner. *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311; *Benjamin v. Levi*, 39 Minn. 11.

⁵ *Bliven v. Hudson River R. R.*, 36 N. Y. 403; *Jewett v. Olsen*, 18 Oregon, 419.

⁶ *Cook v. Holt*, 48 N. Y. 275.

title. He is not at fault until he does some act making himself a party to a litigation of the title;¹ and he cannot refuse, on a reasonable demand, to surrender the goods to the true owner, without assuming the burden of defending the title.²

VII. DELIVERY BY THE CARRIER.

§ 615. The carrier's contract is not fulfilled until he delivers the goods, or discharges himself, or is discharged from his liability by some equivalent act. He engages to carry and deliver the goods safely; his undertaking to transport the goods necessarily includes the duty of delivering them in safety.³

The manner of the delivery is regulated by many circumstances: by the mode of the conveyance; by the nature of the goods; by the custom or course of business; and by the contract.

§ 616. When goods are carried over connecting lines, under a through contract made with the carriers first receiving them, the contract covers the duty of making a safe delivery at the place of destination;—a duty to be discharged in the same manner and subject to the same rules as where he delivers goods to a consignee at the end of his own line.⁴

When the delivery is to be made by one of several connecting lines engaged in the transportation of through freight, the carrier company bringing the goods to their place of destination is bound to deliver them. The obligation of the company is the same as if the first carrier had not contracted for the conveyance and delivery of the goods at the place of destination. The carrier may be charged on the ground of his or its common law liability.⁵ Under the English rule, there is an implied agreement by a railway company, receiving goods addressed to a

¹ *Dudley v. Hawley*, 40 Barb. 398. The bailee may ask for time to investigate the title; *McEntee v. N. J. Steamboat Co.*, 45 N. Y. 34, 37.

² *Rogers v. Weir*, 34 N. Y. 463; *Chaunce v. Syanton*, 7 Mann & Gr. 903. A mere stakeholder may file a bill of interpleader. *Shaw v. Coster*, 8 Paige, Ch. 339. Equitable relief may be had, based on new facts. *N. Y. & H. R. Co. v. Haws*, 56 N. Y. 175; 3 Daly, 373.

³ *Scheu v. Benedict*, 116 N. Y. 510, 513; *De Mott v. Laraway*, 14 Wend. 225; *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Gibson v. Culver*, 17 Wend. 305; *Faulkner v. Hart*, 82 N. Y. 413; *Sherman v. Hudson River R. R. Co.*, 64 N. Y. 254; *Bank of Oswego v. Doyle*, 91 N. Y. 32, 38; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 445.

⁴ *Cutts v. Brainerd*, 42 Vt. 566; *Hill Manuf. Co. v. Boston, etc., R. R. Co.*, 104 Mass. 122; *Toledo, P. & W. R. R. Co. v. Merriman*, 52 Ill. 123; *Lamb v. Camden & Amboy R. R. & Tr. Co.*, 46 N. Y. 271; *Burnell v. N. Y. Central R. R. Co.*, 45 N. Y. 184; ante, § 583.

⁵ Ante, §§ 577, 583; *Burtis v. Buffalo, etc., R. R. Co.*, 21 N. Y. 269; *Noyes v. Rutland & B. R. R. Co.*, 27 Vt. 110; *Buffett v. Troy & Boston R. R. Co.*, 40 N. Y. 168; *Hill Manuf. Co. v. Boston, etc., R. R. Co.*, 104 Mass. 122.

particular place, to be reached by a connecting road, to carry and deliver at that place. The contract is entire, and the first is the contracting carrier, the only party liable for a failure to deliver the goods.¹ The rule appears to be followed in Illinois;² it is not generally followed in this country.

§ 617. The contract prescribes the carrier's duty in making a delivery, where he receives and engages to carry goods over his line and then forward them by another carrier: he remains liable until he delivers them to the next carrier, as specified in the contract.³

The rule is the same where a carrier receives goods or parcels addressed to a point on a connecting line beyond its terminus; on arriving at the terminus, the goods must be safely delivered to the next carrier, pursuant to the shipper's instructions.⁴ The first carrier is liable for the goods until he delivers them into the custody of the second, and where the goods are to pass over several successive lines, the second carrier is liable for them until he delivers them to the third, and third until he delivers them to the fourth, and so onward until the goods reach the place of destination. It is the duty of each carrier forming the line to transfer the goods to the next; and he remains liable for them as a carrier until he does so.⁵

¹ *Mytton v. Midland R. Co.*, 4 Hurl. & Norman, 615; *Coxon v. Great Western R. Co.*, 5 H. & N. 274; *Bristol & Exeter Railway v. Collins*, 7 House of L. Cases, 194.

² *Ill. Central R. R. Co. v. Frankenberger*, 54 Ill. 88; *Anchor Line v. Dater*, 68 Ill. 369; 24 Ill. 332. See also *Angle v. Mississippi R. R. Co.*, 9 Iowa, 487.

³ *Reed v. U. S. Ex. Co.*, 48 N. Y. 462; *Amer. Ex. Co. v. Second National Bank*, 69 Penn. St. 394; *Schneider v. Evans*, 25 Wis. 241; *Conkey v. Milwaukee & St. Paul R. Co.*, 31 Wis. 619; *Cin., Ham. & Dayton, & D. & Mich. R. R. Co. v. Pontius*, 19 Ohio St. 221; ante, § 582; *Hinckley v. N. Y. C. & H. R.*, 56 N. Y. 429; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438; *Rawson v. Holland*, 59 N. Y. 611.

⁴ *Root v. Great Western R. Co.*, 45 N. Y. 524; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Mills v. Mich. Central R. R. Co.*, 45 N. Y. 622; *Johnson v. N. Y. Central R. R. Co.*, 36 N. Y. 610; *Hinckley v. N. Y. Cent. & H. R. R. Co.*, 56 N. Y. 429.

⁵ This rule is held with great strictness; in *Miller v. Steam Nav. Co.*, 10 N. Y. 431, where the goods were burned as they were transferred from a barge to a floating platform from which the next carrier was to take them; and in *Gould v. Chapin*, 20 N. Y. 259, where the goods were burned under like circumstances, and the second carrier had delayed unreasonably to receive them; and in *Mills v. Michigan Central R. R. Co.*, 45 N. Y. 622, where the goods were tendered to the succeeding carrier and burned before they were delivered; and in *Hooper v. Chicago & N. R. Co.*, 27 Wis. 81; and in *Conkey v. Milwaukee & St. P. R. Co.*, 31 Wis. 619, where the goods were destroyed under like circumstances. *Gass & North v. N. Y., Prov. & B. R. Co.*, 99 Mass. 220; ante, § 582.

If the contract of the carrier is to deliver the goods at a point beyond the terminus of his line, he is responsible for the consequences of any default or want of reasonable diligence in that respect on any part of the route unless relieved by some limitation of

Agreements to forward the goods in a particular way or by a specified line, whether made in express terms or implied from the marks or address upon the goods themselves, are to be fulfilled with all fidelity; the carrier must not depart from them. It is his duty, and it is his right, to deliver and forward the goods according to the contract.¹

§ 618. A carrier by coach is bound to deliver to the consignee at his residence or place of business; *prima facie* he is bound to deliver the goods to the consignee personally.² The rule had its origin in the early custom of carriers by land, and it is still enforced, on grounds of public convenience.³ It applies with special propriety to express carriers, established for the purpose of extending to the public the advantages of a prompt conveyance and personal delivery.⁴ It requires an actual delivery of parcels according to their address, unless the duty is qualified by the contract, or by the consignee's consent.⁵ A parcel addressed to the cashier of a bank may in his absence be delivered to a receiving teller standing behind the counter: being by its address legally deliverable to the bank, it is properly delivered to an assistant acting for the bank in business hours.⁶

A carrier is not obliged to deliver a package of money or specie addressed to a bank, within banking hours, unless there is a special contract to that effect or an established usage of business requiring it; and he is bound to tender a delivery of the package, at a reasonable time, and in a reasonable manner, having regard to the safety of the package and the convenience of both parties.⁷

The liability of an express carrier does not terminate on the arrival of a package at the place of destination, until he has used all reasonable

liability in the contract of affreightment. *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438; *Falvey v. Georgia R. R. Co.*, 76 Ga. 597.

¹ *Babcock v. Lake Shore & M. S. R. Co.*, 49 N. Y. 491; *Van Santvoord v. St. John*, 6 Hill, 157; *Simkins v. N. & N. L. St. Co.*, 11 Cush. 102; *White v. Ashton*, 51 N. Y. 280; *Hineckley v. N. Y. Central & H. River R. Co.*, 56 N. Y. 429; *all rail*, *Bostwick v. Baltimore & Ohio R. R. Co.*, 45 N. Y. 712; *United States Ex. Co. v. Haines*, 67 Ill. 137.

² *Gibson v. Culver*, 17 Wenl. 305, citing *Golden v. Manning*, 3 Wils. 425, 433; *Owen*, 57; *Storr v. Crowley*, 1 McClell. & Young, 129, 138; *Richmond v. Union Steamboat Co.*, 87 N. Y. 240, 244.

³ *Great Western R. v. Crouch*, 3 H. & N. 183; 2 Kent's Com. 604.

⁴ *Witbeck v. Holland*, 45 N. Y. 13.

⁵ *Haslam v. Adams Ex. Co.*, 6 Bosw. 235; *Sweet v. Barney*, 24 Barb. 533; *S. C.* 23 N. Y. 335; *Am. U. Ex. Co. v. Robinson*, 72 Penn. St. 274; *Finn v. West. R. R.*, 102 Mass. 283; *Adams Ex. Co. v. Stettaners*, 61 Ill. 184.

⁶ *Hotchkiss v. Artisans' Bank*, 42 Barb. 517; *S. C.* 2 Keyes, 564.

⁷ *Merwin v. Butler*, 17 Conn. 138; *Young v. Smith*, 3 Dana, 91; *Marshall v. American Ex. Co.*, 7 Wis. 1.

diligence to find the consignee and deliver the package to him. Having fulfilled his contract, his liability diminishes to that of a bailee for hire;¹ and he will afterwards hold the package subject to the owner's order, subject to the order of the consignee where the shipper retains no interest in it;² and subject to the order of the consignor where he retains the title or right to control the disposition of the property.³

§ 619. A transaction requiring the concurrence of two parties in a matter of business, such as a delivery of goods by a carrier to a consignee, naturally takes its form with due consideration for the convenience of both parties. A mode of action is gradually adopted, as suggested and qualified by experience, with a view to promote the convenience and safety of the business; by degrees this mode of action settles into a general custom, and becoming well known, all parties make their contracts with reference to it. This appears to be the genesis of the rules of law prescribing the carrier's duty in delivering goods.⁴

Carriers by water, in the absence of any special custom, deliver on the wharf, at a suitable time, and on a reasonable notice to the consignee.⁵ The delivery must be made in a reasonable manner, so that the consignee may receive the goods; and if for any reason the consignee does not receive them, it is the carrier's duty to protect them from loss or injury; the law does not permit him to leave them neglected on the wharf.⁶ He must deliver them to the consignee, or place them within his legal custody; and he does this where the consignee, being present, accepts the consignment or evinces a readiness to receive the goods, and the same are landed on the wharf so as to give the con-

¹ *Witbeck v. Holland*, 45 N. Y. 13; *Adams Ex. Co. v. Darnell*, 31 Ind. 20.

² *Thompson v. Fargo*, 58 Barb. 575; 44 How. Pr.; and S. C. 49 N. Y. 188; and 63 N. Y. 479.

³ *Lewis v. Galena, etc.*, R. R. Co. 40 Ill. 281; *Hamilton v. Nickerson*, 11 Allen, 308; 8 Exch. 341.

⁴ *Golden v. Manning*, 2 W. Bl. 916; 3 Wils. 429; *Stoer v. Crowley*, *McClelland & Y.* 129; *Ostrander v. Brown*, 15 John. R. 39; *Packard v. Getman*, 6 Cowen, 757.

⁵ *Price v. Powell*, 3 N. Y. 322; *Fisk v. Newton*, 1 Denio, 45; 17 Wend. 305; *McAndrew v. Whitlock*, 52 N. Y. 40; *Zinn v. N. J. Steamboat Co.*, 49 N. Y. 442; *Richmond v. Union Steamboat Co.*, 87 N. Y. 240, 245; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170.

⁶ *Redmond v. Liverpool, N. Y. & Phila. S. Co.*, 46 N. Y. 578; *Richardson v. Goddard*, 23 How. U. S. Rep. 28; *Gatliff v. Bourne*, 4 Bing. N. C. 314; 3 M. & G. 643; 11 Clark & Fin. 45; *Withers v. N. J. Steamboat Co.*, 48 Barb. 445; *Herman v. Goodrich*, 21 Wis. 356; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170; *Scheu v. Benedict*, 116 N. Y. 510.

signee a reasonable time and opportunity to take charge of and remove them.¹

§ 620. The carrier's duty to call upon the consignee, or notify him of his readiness to deliver the goods, may be qualified by circumstances, by the course of business between the parties, or by contract. The carrier is not required to do impossible things; and so he need not give the usual notice, where on due inquiry he cannot find the consignee or his place of business;² he may store the goods or retain them as a warehouseman. The carrier is not bound to depart from the established course of business; and so where a steamboat regularly carries and delivers goods on its wharf, from which the consignee habitually takes them without notice, the delivery is sufficient to relieve the carrier of his extraordinary liability, after the lapse of a reasonable time to remove the goods. The course of business enters into the contract;³ and so does the usage or custom of the port where the delivery is to be made, unless the contract provides for a different mode of delivery.⁴ A general usage or custom regulating the mode of delivery *prima facie* binds the parties; it is not necessary to show, in order to bind a party, that he was conversant with the custom;⁵ still the carrier must prove the existence of a local usage relied upon by him, as dispensing with the usual notice to the consignee, where the goods are landed on the wharf.⁶

§ 621. It is the privilege of a carrier by water to deliver goods on the wharf at his usual place of discharge; his implied contract is to carry from port to port, and he is not obliged to bring his vessel to a

¹ Goodwin v. Baltimore & Ohio R. R. Co., 50 N. Y. 154; Scholes v. Ackerland, 15 Ill. 474; per GROVER, J., in Witbeck v. Holland, 45 N. Y. 13, 17.

² Pelton v. Rensselaer & S. R. R. Co., 54 N. Y. 214; Northrop v. Syracuse & B. N. Y. R. R. Co., 2 Trans. App. 183; Herman v. Goodrich, 21 Wis. 356.

³ Ely v. New Haven S. Co., 53 Barb. 207; Farmers', etc., Bank v. Champlain Trans. Co., 23 Vt. 186; Richardson v. Rich. 104 Mass. 156; The J. Russell Manuf. Co. v. N. H. Steamboat Co., 50 N. Y. 121; S. C. 52 N. Y. 657; ante, § 525. See Richmond v. Union Steamboat Co., 87 N. Y. 240, and cases cited.

⁴ Atlantic Nav. Co. v. Johnson, 4 Robt. 474, 498; Gleadell v. Thompson, 56 N. Y. 194; Henshaw v. Rowland, 54 N. Y. 242; Richmond v. Union Steamboat Co., 87 N. Y. 240.

⁵ Gibson v. Culver, 17 Wend. 305; Van Santvoord v. St. John, 6 Hill, 157; Turner v. Huff, 46 Ark. 222; Farmers' & M. Bank v. Champlain Transp. Co., 16 Vt. 52. As to the general effect of a custom, see Walls v. Bailey, 49 N. Y. 464.

⁶ Rowland v. Miln, 2 Hilton, 150. Where delivery to the consignee is stipulated in the bill of lading, to justify a substituted delivery the carrier must show that such delivery is in accordance with the usage and custom of the port of delivery. Richmond v. Union Steamboat Co., 87 N. Y. 240. For some purposes a tender of delivery has the same effect as an actual delivery. Clendaniel v. Tuckerman, 17 Barb. 184.

wharf nearest or most convenient to the consignee.¹ His actual contract may, and often does, control the time and mode of the delivery, while it apportions the expense and risk attendant upon the landing of the goods.²

§ 622. The consignee's liability for demurrage is based upon his duty to receive the goods brought to him by the carrier within a reasonable time; and the rules rendering him thus liable under the contract or under the custom of the port may be received as fixing what the law regards as a reasonable time for the landing and delivery of goods.³ These rules may also be considered as bearing upon the carrier's duty where the consignee unreasonably delays to accept and receive the goods. As the delay does not leave him without a legal remedy and redress for the injury he sustains, the law does not justify him in landing goods on a holiday, or perishable goods in bad weather;⁴ and it does not discharge him from the duty of taking reasonable care of ordinary goods after he has landed them, on a wharf chosen by himself, at a reasonable time and on due notice. The consignee's failure to appear does not justify him in leaving the goods unprotected; and it does not relieve him of the duty to deliver or store the goods.⁵ The rule is different where the consignee appears and pays the freight, showing his readiness to receive the goods; or where he selects the wharf and commences to receive the goods. Here it is the duty of the consignee to protect the goods against damages from the weather; and the delivery is complete as soon as the consignee has had a reasonable time to remove them.⁶

An unreasonable delay by the consignee to receive the goods, after notice of their arrival, relieves the carrier of his common law liability

¹ *Western Transp. Co. v. Hawley*, 1 Daly, 327; *Chickering v. Fowler*, 4 Pick, 371; *Ostrander v. Brown*, 15 John. 39; *Gatliff v. Bourne*, 4 Bing. N. C. 314; *Cope v. Cordova*, 1 Rawle, 203. See *Richmond v. Union Steamship Co.*, 87 N. Y. 240, 245.

² *Gleadell v. Thompson*, 56 N. Y. 194. See *Western Transp. Co. v. Hoyt*, 69 N. Y. 230. Where the contract calls for delivery at the warehouse of the consignee, delivery must be made there whether the carriage is by land or water, by rail or barge. *N. Y. C. & H. R. R. Co. v. Standard Oil Co.*, 87 N. Y. 486.

³ *Ante*, §§ 592, 593.

⁴ *McAndrew v. Whitlock*, 2 Sweeny, 623; S. C. 52 N. Y. 40. See *Russel Manuf. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121, where the goods were landed on the fourth of July, and it was not the consignee's custom to receive goods on that day.

⁵ *Redmond v. Liverpool*, N. Y. & Phila. S. Co., 46 N. Y. 578; *Collins v. Burns*, 63 N. Y. 1; 7 Blatchf. 186; *Guillaume v. General Transp. Co.*, 100 N. Y. 491, 500; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170; *Scheu v. Benedict*, 116 N. Y. 510.

⁶ *Goodwin v. Baltimore & Ohio R. R. Co.*, 50 N. Y. 154; 50 N. Y. 121; *Richardson v. Goddard*, 23 How. U. S. 28.

and brings him under the usual obligation of a bailee for hire. The consignee cannot arbitrarily prolong the time during which the carrier shall remain liable as an insurer;¹ and it appears that an agreement by the carrier to retain the goods on board for some days for the accommodation of the consignee, after tendering a delivery, does not prolong his responsibility as a carrier.²

§ 623. The carrier's duty to notify the consignee of the arrival of the goods is enforced in many forms. If the consignee be absent or unknown, it is the carrier's duty to use proper and reasonable diligence to find him; and if by the exercise of such diligence the consignee cannot be found, the carrier discharges his duty as such by storing the goods in a proper manner. A reasonable and diligent effort to find the consignee is a condition precedent to the carrier's right to store the goods; and the carrier's failure in this duty will render him liable for the damages resulting from his neglect, by depreciation in value, or otherwise.³ Having fulfilled his duty, the carrier may deposit the goods in a warehouse subject to his lien for freight;⁴ or he may thus deposit them, receiving his freight from the warehouseman, and free himself from all further interest in or duty in respect to the goods.⁵

What is the duty of the carrier when the consignee refuses to accept the goods? It can hardly be claimed that he comes under any different or greater obligation than that which the law imposes upon him where he fails, after using due diligence, to find the consignee. A return of the goods is not required. There is no ground on which to infer a request by the consignor to bring back the goods, since in many cases the return freight would be utterly lost; the goods being as a rule of greater value at the place of destination than at the point of departure.⁶

¹ *Clendaniel v. Tuckerman*, 17 Barb. 184; *Hedges v. Hudson River R. Co.*, 49 N. Y. 223; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 180.

² *Hathorn v. Ely*, 28 N. Y. 78; *Bank of Oswego v. Doyle*, 91 N. Y. 32. In such case the vessel becomes a warehouse. *Id.* See *Nat. Steamship Line v. Smart*, 107 Pa. St. 492.

³ *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442; 45 N. Y. 13; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Mors-le-Blanch v. Wilson*, 5 English (Moak), 286; *Bank of Oswego v. Doyle*, 91 N. Y. 32; *Scheu v. Benedict*, 116 N. Y. 510; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170.

⁴ *Western Transp. Co. v. Barber*, 56 N. Y. 544.

⁵ *Hamilton v. Nickerson*, 11 Allen (Mass.), 308; *Fish v. Newton*, 1 Denio, 45.

⁶ *Mors-le-Blanch v. Wilson*, 5 English (Moak), 286, involving a cargo of coal carried from the Thames to Buenos Ayres; *Steamboat Keystone v. Moies*, 28 Mo. 243; 1 Denio, 45. When the person named in the bill of lading as the one to whom delivery is to be made refuses to receive the goods, the only duty attaching to the ship is to

Where goods are sent by a carrier to be delivered to the consignee, the purchaser, on his paying the price of them, the carrier discharges his duty by tendering a delivery of the goods on the terms of the contract; and where the consignee promises from time to time to take and pay for the goods, the carrier's omission to notify the consignor of the delay is not an act of negligence. And he is not liable for the goods as a carrier after tendering a delivery of them for cash.¹

§ 624. Ships and vessels transport goods from port to port, having no facilities for transferring the goods from the landing place to the consignee's warehouse or place of business. Railroads transact the carrying business under a similar limitation. They can only receive and deliver goods at fixed stations or depots, at the terminus, or along the line of the track. They provide no facilities for removing the goods from the station or depot: the law does not require it of them, and it is no part of their business to do so.

Under a statute of this State regulating the business of railroad corporations, it is required that every such corporation shall start and run their cars for the transportation of passengers and property, at regular times to be fixed by public notice; and shall furnish sufficient accommodation for the transportation of all such passengers and property, as shall within a reasonable time previous thereto be offered for transportation at the place of starting and at the junctions of other railroads, and at usual stopping places established for receiving and discharging way passengers and freight; and shall both transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor.²

The statute makes railroad corporations common carriers of property,³ with such variations as the nature of the business requires. It imposes upon them the same general duties as the common law prescribes to the common carrier.⁴

§ 625. Where there is no custom to the contrary, carriers by water must give notice of the arrival of goods, and of their readiness to deliver. By analogy, railway carriers should notify the consignee of the arrival of goods, and give him a reasonable opportunity to remove them, before they place the goods in store and assume the character of

keep the goods for the owner. *Wilson v. Royal Exchange Shipping Co.*, 24 Fed. Rep. 815.

¹ *Weed v. Barney*, 45 N. Y. 344; *Grossman v. Fargo*, 6 Hun, 310; *Lyons v. Hill*, 46 N. H. 49.

² Laws of 1890, Chap. 565, § 34, as amended by Laws of 1892, Chap. 676.

³ Laws of 1890, Chap. 565, § 48, as amended by Laws of 1892, Chap. 676.

⁴ *Wibert v. New York & Erie R. Co.*, 12 N. Y. 245.

warehousemen.¹ It is clear that a railway carrier remains liable as such, until the consignee has had a reasonable time to remove the goods; as where they arrive so late in the afternoon that the consignee has no opportunity to remove them before the close of business hours for the day, and they are burned up during the night.² The custom of railroads in this State is to give the consignee notice that the goods are ready for delivery; and the law requires them to give the notice; it treats them like ordinary carriers, who are not bound to carry the goods to the consignee's place of business.³

In some of our States a railroad carrier is not required to give the consignee notice of the arrival of goods. The decisions to that effect proceed upon two grounds: first, that the contract of the railroad *does* not in terms bind the company to give the notice; and second, that it is the duty of the consignee to anticipate the arrival and call for the goods; that being advised of the shipment, as he is in the usual course of business, he can compute or reckon the time of the arrival with reasonable certainty.⁴ His contract is the same as that of a carrier by water; and the time of the arrival by water can be ascertained beforehand with nearly the same certainty as the arrival of freight by a railroad. As a matter of principle, it is therefore difficult to point out any true ground of discrimination between carriers by rail and carriers by water.

§ 626. It is conceded that a railroad carrier must give notice of the

¹ *Schroeder v. Hudson River R. Co.*, 5 Duer, 55, 62; *Clark v. Masters*, 1 Bosw. 177, 183; *Rome Railway v. Sullivan*, 14 Geo. R. 277; *Michigan Central v. Ward*, 2 Mich. 538; *Browning v. Long Island R. Co.*, 2 Daly, 117; *Hedges v. Hudson River R. Co.*, 6 Robt. 119; S. C. 49 N. Y. 223; *Fenner v. Buffalo & State Line R. Co.*, 44 N. Y. 505; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *McKinney v. Jewett*, 24 Hun, 19; *Faulkner v. Hart*, 82 N. Y. 413.

² *Moses v. Boston & Maine R. Co.*, 32 N. H. 523; *Wood v. Crocker*, 18 Wis. 345. See *Francis v. Dubuque & Sioux City R. R. Co.*, 25 Iowa, 60, excusing the railway carrier under like circumstances; and 1 Gray (Mass.), 263. See *McKinney v. Jewett*, 24 Hun, 19; *Faulkner v. Hart*, 82 N. Y. 413.

³ *Crawford v. Clark*, 15 Ill. 561; *Gaff v. Bloomer*, 9 Penn. St. 114; 64 N. Y. 254; 49 N. Y. 223, and cases above cited.

⁴ *Thomas v. Boston & Prov. R. Co.*, 10 Metc. R. 472; *Norway Plains Co. v. Boston & Maine R.*, 1 Gray (Mass.), 263; *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 Vt. 211; *Bansemer v. Toledo & Wabash R. Co.*, 25 Ind. 435; *Francis v. Dubuque & Sioux City R. R. Co.*, 25 Iowa, 60; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268; *Morris & Essex R. Co. v. Ayres*, 29 N. J. Law R. 393; *Skenk v. Phila. Steam P. Co.*, 60 Penn. St. 109; *Moses v. Boston & Maine R. Co.*, 32 N. H. 523; *Illinois R. Co. v. Friend*, 64 Ill. 303; *Illinois Central R. Co. v. Cobb*, 64 Ill. 128; *Anchor Line v. Knowles*, 66 Ill. 150; *Rothschilds v. Mich. C. R. Co.*, 69 Ill. 164, 630; *Rice v. Hart*, 118 Mass. 201; *Stowe v. N. Y., Boston & P. R.*, 113 Mass. 521.

arrival of goods, where it is the custom to do so.¹ On the same ground, of a well-known custom, the giving of a notice may be excused; the delivery being generally regulated by the custom or course of business.² A road having many way stations to which it carries goods, addressed to parties doing business some little distance therefrom, does not find it convenient to send a messenger with notice to the consignee whenever a package is received. The road cannot afford the expense of the extra service required, and the neighborhood cannot well get along without using the railroad and receiving its freight from the station. The situation and the business give rise to a custom, under which the goods addressed to persons living near it are received at the station to await the call of the consignee, without notice. The custom becoming once established, contracts are made with reference to it, and the carrier fulfills his duty by delivering the goods or package in the usual manner; or by receiving and placing the same in his warehouse to await removal by the consignee. Under the custom the carrier becomes a warehouseman, and liable only in that capacity after the lapse of a reasonable time to remove the goods. The authorities in the different States may be reconciled on this theory of custom, as modified by contract and the varying circumstances attending the arrival and storage, or delivery of goods.³

The principle is not new. Where a carrier has a warehouse at the place of destination, in which, by a usage well known among his employers, or by a special agreement, he is accustomed to store the goods for the accommodation and benefit of the owner until it is convenient for him to come and take them away, the carrier is not answerable for them as a carrier, after they are safely warehoused.⁴ His duty having ended as a carrier, his responsibility is changed, as we have seen, into that of a warehouseman. If no act remains to be done by him in his character as a carrier, his liability as such is at an end.⁵ And where he unites the two characters of a warehouseman and carrier, and receives goods for storage until an order of the owner is given to send them forward,

¹ *Chicago & N. R. Co. v. Sawyer*, 69 Ill. 285; 18 American R. 613, relating to bonded goods arriving in Chicago.

² *Hurd v. Hartford & N. Y. S. Co.*, 40 Ct. 48; *The J. Russell Manuf. Co. v. N. H. S. Co.*, 52 N. Y. 657; 50 N. Y. 121.

³ *Ante*, § 625, and authorities there cited; also, *Tanner v. Oil Creek Railway*, 53 Penn. St. 411; *Price v. Powell*, 3 N. Y. 323; *New Albany & Salem R. Co. v. Campbell*, 12 Ind. 55; *Barstow v. Murison*, 14 La. Ann. 335; *Gauch v. Storer*, 14 La. Ann. 411, 417; in respect to baggage, under a promise to keep over night; *Ouimit v. Henshaw*, 35 Vt. 605.

⁴ *Matter of Webb*, 8 Taunt. R. 443.

⁵ *Hyde v. Trent & Mersey Nav. Co.*, 5 Term R. 389.

or where he transports them to the end of the route, and there, by agreement or by a usage tantamount to a contract, places them in store to await the call of the owner, he is responsible as a warehouseman while discharging the duties incident to that species of bailment.¹

§ 627. The carrier is as much bound to deliver goods safely as he is to carry them safely. He is liable for the goods, where he delivers them to a wrong party, though the misdelivery be procured by fraud.² He is liable for the injury or loss of goods, caused by the breaking of the tackle or machinery used by him in landing or delivering the goods;³ unless the consignee himself furnishes the machinery or assumes the control and direction of the business;⁴ or unless the contract relieves him from liability therefor.⁵

The burden of proving a delivery, or equivalent facts, rests upon the carrier. The law requires him either to deliver, or to excuse a non-delivery of the goods.⁶

Where it appears to be the custom or course of business known to the consignor, the carrier may discharge himself by showing a delivery of goods or packages to a wharfinger;⁷ not so where the consignee calls for the goods at the proper place and in the proper time.⁸ Landing goods on a wharf, the carrier must see that they are actually received by the consignee or by some one authorized to act for him.⁹

§ 628. The carrier must deliver, or tender a delivery, within the usual hours of business. If the goods arrive in the evening, too late for delivery on the same day, the carrier's responsibility continues until

¹ *Platt v. Hibbard*, 7 Cowen, 497; 11 Adolph. & Ellis, 43; *O'Niel v. N. Y. C. & Hudson River R. R. Co.*, 60 N. Y. 138; *Rogers v. Wheeler*, 52 N. Y. 262.

² *Winslow v. Vt. & Mass. R. Co.*, 42 Vt. 700; *Clafin v. Boston, etc., R. R. Co.*, 7 Allen, 341; *Powell v. Myers*, 26 Wend. 591; *Collins v. Burns*, 4 J. & Sp. 518; 63 N. Y. 1; *Furman v. Union Pacific R. R. Co.*, 106 N. Y. 579; *Wernwag v. Phila., etc., R. R. Co.*, 117 Pa. St. 46; *Guillaume v. General Transp. Co.*, 100 N. Y. 491; *McCulloch v. McDonald*, 91 Ind. 240. The carrier has his remedy against the person wrongfully receiving the goods or against any other person to whom he may deliver them. *Young v. East Ala. Ry. Co.*, 80 Ala. 100.

³ *De Mott v. Laraway*, 14 Wend. 225. He must provide a safe place of delivery. *Sunderland v. Westcott*, 2 Sweeny, 260.

⁴ *Louis v. Western Railroad Corporation*, 11 Metcalf, 509.

⁵ *Knowles & Randall v. Dabney*, 105 Mass. 437.

⁶ *Sheldon v. Robinson*, 7 N. H. 157; *Union Ex. Co. v. Graham*, 26 Ohio St. 595; *Turnbull v. Citizens' Bank*, 16 Fed. Rep. 145; *United States v. Pacific Express Co.*, 15 Fed. Rep. 867.

⁷ *Farmers & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 183, 209; *Noyes v. Rutland & B. Railway*, 27 Vt. 110; *Hurd v. Hartford & N. Y. S. Co.*, 40 Ct. 48.

⁸ *Graves v. H. & N. Y. Steamboat Co.*, 38 Ct. 143.

⁹ *Hemphill v. Chenie*, 6 Watts & Serg. 62; *Dean v. Vaccaro*, 2 Head (Tenn.), 488.

the proper time arrives for making a delivery. The defendants, who were common carriers, undertook to carry certain boxes of goods on the railroad from Philadelphia to Columbia. The cars arrived at the latter place about sundown on Saturday evening, and by direction of the plaintiffs were placed on a siding. The plaintiffs declined receiving the goods that evening on the ground that it was too late; whereupon the defendants' agent left the cars on the siding, taking with him the keys with which the cars were locked, and promising to return on Monday morning. The cars remained there till Monday morning, when they were opened, and it was found that one of the boxes had been rifled; and it was adjudged that the defendants were answerable for the goods lost.¹

§ 629. The owner of the goods in the hands of the carrier has the right to control the disposition of them.² *Prima facie* the consignee has the right to control the delivery;³ and yet the shipper may, as we have seen, reserve to himself the *jus disponendi*, and by transferring the bill of lading, convey the property to any other party; and where he does so, the party thus acquiring the indicia of title has the right to demand and receive the goods. The rule has been recently applied to the receipt given by a railway carrier; the same being considered in the nature of a bill of lading.⁴

The carrier is entitled to a reasonable time to ascertain the identity

¹ *Eagle v. White*, 6 Whart. 505; *Hill v. Humphreys*, 5 Watts & Serg. 123.

² *C. & P. R. R. Co. v. Sargent*, 19 Ohio St. 438, holds that the party delivering and paying freight on goods may resume control of them.

³ *Sweet v. Barney*, 23 N. Y. 335. When goods are delivered by a vendor to a carrier to be conveyed to a certain place with the added words, "for Messrs. Stein & Co."—these persons thus appearing to be the consignees of the goods, may demand them of the carrier at another place, and the carrier will be justified in delivering them. *Cork Distilleries Co. v. Great Southern & Western R. Co. (Ireland)*, 7 L. R. H. L. Cas. 269; 8 Ir. R. C. L. 334.

⁴ *Ante*, §§ 210–213; *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360; *Mechanics & Traders' Bank v. Farmers & Mechanics' National Bank*, 60 N. Y. 40; *Bailey v. Hudson River R. R. Co.*, 49 N. Y. 70; *City Bank v. Rome, W. & O. R. R. Co.*, 44 N. Y. 136; 4 N. Y. 497; *Rawls v. Deshler*, 3 Keyes, 572; *Dows v. Green*, 24 N. Y. 638; *Cayuga Co. Bank v. Daniels*, 47 N. Y. 632; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Brown v. Combs*, 63 N. Y. 599; *Armour v. Michigan C. R. Co.*, 65 N. Y. 111. It is apparent from these cases that the carrier is bound to deliver to the party having the title. The carrier's receipt is in effect a bill of lading. *National Bank of Green Bay v. Dearborn*, 115 Mass. 219; *Newcomb v. Boston & Lowell Railroad*, 115 Mass. 230; *Alderman v. Eastern Railroad*, 115 Mass. 233; *Southern Ex. Co. v. Dixon*, 15 Albany Law Journal 491; *Furman v. Union Pacific R. R. Co.*, 106 N. Y. 579, 585; *Howard v. Shepard*, C. B. 9 M. Gr. & Scott, 297; *Tindall v. Taylor*, 4 El. & Bl. 219; *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24; *Colgate v. Pennsylvania Co.*, 31 Hun, 297.

of the consignee, or party holding the title.¹ Being responsible for any mistake, the law allows him to act with deliberation.

§ 630. The carrier holds the goods subject to the vendor's right of *stoppage in transitu*, where that right exists and is properly asserted. The right to stop the goods in their transit is based on the vendor's equitable demand for the purchase money. It is of equitable origin; it does not proceed upon the theory of rescinding the contract, but rather on the theory of repossessing and retaining the goods as a security for the price.² It is regarded as a power tacitly reserved out of the former control which the consignor had over his property at the time of delivering it to the carrier, and therefore paramount to any agreement between the carrier and consignee, in respect of any duty or right of lien which may arise upon those or other goods; so that if the consignor would exert this privilege, and reclaim the goods, he is subject only to such lien or duty as may have arisen in consideration of that particular bailment, for the labor and diligence bestowed on the goods.³

The right of *stoppage in transitu* on a sale of goods on credit arises where the vendee becomes insolvent after the sale and before the goods have been actually delivered to him, or to his agent for him having some authority in respect to the goods unconnected with their transit; as to keep or dispose of them. The basis of the right is, that the insolvency of the vendee was not contemplated by the vendor in the sale, and that it is plainly just that he should, on account of that unforeseen event, endangering the loss of the price to be paid, be permitted to reclaim the goods and keep them as security for payment at any time before a delivery terminating their transit. The right is limited to that period, and ends with such a delivery.⁴

¹ *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34.

² *Gibson v. Caruthers*, 8 M. & W. 337; *Valpy v. Oakley*, 16 Q. B. 941; 20 L. J. Q. B. 380; *Griffiths v. Perry*, E. & E. 680; 28 L. J. Q. B. 204; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Martindale v. Smith*, 1 Q. B. 380. There seems to be considerable uncertainty in England as to this origin of the right, but in this country the decisions preponderate in favor of the theory of a lien. See *Rowley v. Bigelow*, 12 Pick. 307; *Stanton v. Eager*, 16 Pick. 467-475; *Arnold v. Delano*, 4 Cush. 33, 39; *Newhall v. Vargas*, 13 Maine, 93; S. C. 15 id. 314; *Rogers v. Thomas*, 20 Conn. 53; *Ellis v. James*, 5 Ohio R. 88-98; *Harris v. Pratt*, 17 N. Y. 249, 263. The question has never been definitely decided in this State. *Babcock v. Bonnell*, 80 N. Y. 244, 251. See *Muller v. Pondir*, 55 N. Y. 325, 337.

³ *Oppenheim v. Russell*, 3 Bos. & Pul. 49; *Jeremy on Car.* 103; *Gossler v. Schepeler*, 5 Daly, 476.

⁴ *Harris v. Pratt*, 17 N. Y. 249, 263; 5 Daly, 476. The right is not confined to goods or personal chattels or to a sale of goods on credit, and there is no distinction

§ 631. The right to stop the goods exists only where they are sold on a credit, and where it is necessary to secure the payment of the purchase money; *e. g.*, it does not exist where the consignor owes the consignee a debt, equal in amount to the purchase price.¹

The right exists where the consignee is insolvent at the time of the purchase, or becomes so before the goods are delivered to him.² The right does not necessarily presuppose a fraud in the purchase; and while the right can hardly be asserted where the vendor knew of the purchaser's insolvency at the time of the sale, it is clear that the consignor and seller may assert the right where, after the sale, he learns the fact that such *insolvency* existed at the time of the sale, *viz.*, general inability by the purchaser to pay his debts.³

The right remains so long as the goods are in the hands of the carrier or other persons concerned in transporting them to the place of destination. It exists until the transit has ended; until the goods come into the actual or constructive possession of the vendee; until they come into the hands of some one receiving them as his agent, unconnected with the business of forwarding them.⁴ The right exists as long as the goods remain in the hands of the carrier or middleman; it does not cease on the carrier's storing the goods in his own warehouse, nor until he actually delivers the goods.⁵ Delivery to a warehouseman or wharfinger, who receives the goods at the place of destination in the ordinary course of business as a middleman, is not a constructive delivery to the purchaser;⁶ and the storing of the goods, at the place of destination, in a warehouse which the consignee is accustomed to use as his own, or placing them on a wharf from which the consignee is to take them, is a delivery of the goods terminating the right to arrest them.⁷

so far as the exercise of the right is concerned between personal chattels or merchandise *in transitu* and money or negotiable bills. *Muller v. Pondir*, 55 N. Y. 325.

¹ *Clark v. Mauran*, 3 Paige Ch. 373.

² *Loeb v. Peters*, 63 Ala. 243; *Schwabacher v. Kane*, 13 Mo. App. 126.

³ *Parker v. Gossage*, 2 C. M. & R. 617; *Biddlecome v. Bend*, 4 Ad. & E. 332; *Buckley v. Furniss*, 15 Wend. 137; 17 Wend. 504; *Hitchcock v. Covill*, 20 Wend. 167; *Lacker v. Rhoades*, 51 N. Y. 641.

⁴ *Mottram v. Heyer*, 5 Denio, 629; *Covill v. Hitchcock*, 23 Wend. 611; *Holbrook v. Vose*, 6 Bosw. 76.

⁵ *Calahan v. Babcock*, 21 Ohio St. 281; *Powell v. McKechnie*, 3 Dak. 319; *Symms v. Schotten*, 35 Kansas, 310; *Harding Paper Co. v. Allen*, 65 Wis. 576. But see *Hall v. Dimond*, 63 N. H. 565.

⁶ *Edwards v. Brewer*, 3 Mees. & Wels. R. 375.

⁷ *Rowe v. Pickford*, 8 Taunt. 83; *Sawyer v. Joslin*, 18 Vt. 172. The right is lost where the consignee intercepts the goods on the route, and takes them into his custody. *Foster v. Frampton*, 6 B. & C. 107. The delivery of goods to the vendee which puts an end to the state of passage and to the right of stoppage *in transitu*, may be at

The right continues to exist until the buyer receives, or has transferred the property to a *bona fide* purchaser for value, by a transfer, or by a pledge of the bill of lading. But since a transfer of the bill to a purchaser, or to a party honestly making advances upon it, is valid, it necessarily cuts off the right of stoppage *in transitu*.¹ And the carrier must respect the rights of the party thus acquiring the title to the property.²

§ 632. The right of stoppage *in transitu* is exercised by giving to the carrier or middleman notice not to deliver over the goods to the consignee, accompanied by a tender of the freight and legal charges. The form of the demand is not important: it is the carrier's duty to obey and act upon the notice; but since he acts upon his own responsibility, his prudent course is to ask for a bond of indemnity, protecting him against his possible liability to the consignee.³

The demand must be made of the proper party; the notice must be given to the carrier or middleman in whose custody the goods are at the time, so as to prevent a delivery of them to the vendee.⁴ In order to make the notice effectual, it must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has such custody, at such time and under such circumstances that he may with reasonable diligence prevent the delivery of the goods to the purchaser or consignee.⁵

Without going more fully into this subject, it is proper to observe that the right to stop the goods at any time before they come into the possession of the consignee, is favored, because founded in equity; and that it prevails over attachments and executions levied upon the property on behalf of the creditors of the consignee at any time before the same reaches him; the vendor's right being considered the older and preferable lien.⁶

a place where the vendee means the goods to remain until a fresh destination is given to them by orders from himself. *Becker v. Hallgarten*, 86 N. Y. 167.

¹ *Dows v. Greene*, 24 N. Y. 638; *Gurney v. Behrend*, 3 Ellis & Bl. 622; *Lickbarrow v. Mason*, 1 Smith's L. Cases, 199, 6th ed.; *Becker v. Hallgarten*, 86 N. Y. 167; *Loeb v. Peters*, 63 Ala. 243. As to effect of seller's suit and recovery against carrier, see *Rawls v. Deshler*, 3 Keyes, 572.

² *Bailey v. Hudson River R. R. Co.*, 49 N. Y. 70.

³ *The Tigress*, 32 L. J. Adm. 97. As to the form of the notice or demand required, see *Harris v. Pratt*, 17 N. Y. 249, 252. If the carrier disregards the shipper's order to stop and return the goods, and delivers them to the consignee, he is liable for the damages sustained by the shipper. *Allen v. Maine Cent. R. R. Co.*, 79 Me. 327.

⁴ *Mottram v. Heyer*, 5 Denio, 629.

⁵ *Whitehead v. Anderson*, 9 Mees. & Welsb. 518.

⁶ *Smith v. Goss*, 1 Campb. 282; 15 Wend. 144, 145; *Coates v. Railten*, 6 Barn. & Cress. 422; 7 Term, 436; *Dixon v. Baldwin*, 5 East, 186; *Rowe v. Pickford*, 8 Taunt. . .

§ 633. The carrier is bound to deliver the goods on payment of the freight; the obligation to deliver and to pay being mutually dependent, the one upon the other.¹ The acts are simultaneous and concurrent; the carrier is not bound to deliver without payment, and the consignee is only bound to pay the freight on a delivery of the goods; that is, when they are landed and ready to be placed in the custody of the consignee.¹ The active duty in making a delivery is with the carrier, and as a fact usually precedes the payment of the freight; but where the delivery is procured by a false and fraudulent promise to pay the freight as soon as the goods are received, the carrier may disaffirm the act and retake or recover the goods in an action of replevin.²

VIII. CARRIER'S HIRE OR REWARD.

§ 634. One ground on which the carrier's responsibility arises is the reward he receives for the carriage or transportation of property. Hence where the value of the goods delivered to him is fraudulently concealed or misrepresented, the carrier cannot be held liable on the contract for the value of the goods.³

The hire, price or reward for the carriage is of the essence of the carrier's contract;—he is not a common carrier unless he carries for hire.⁴ It is not however necessary that the hire should be agreed upon at a fixed sum. His character is such that the law implies an undertaking or promise to pay him a reasonable reward for the carriage of the goods delivered to him for that purpose.⁵

The carrier's duty to receive and carry all goods tendered to him, of the kind he usually carries, is qualified by his right to demand prepayment of his hire or compensation.⁶ But if he omit to demand prepayment, and refuse to receive the goods, a general tender of a reasonable reward for the carriage will be sufficient to charge him in an action for a refusal.⁷ Having received the goods for carriage without a prepayment of his hire or freight, the law gives him a right to demand his compensation on the delivery of the goods at the place of destination. And to secure this right a lien is given to him on the property.⁸

83; *Mississippi Mills v. Union & Planters' Bank*, 9 Lea (Tenn.), 314; *Sherman v. Ruyce*, 55 Wis. 346.

¹ *Clark v. Masters*, 1 Bosw. 177; *Langworthy v. N. Y. & Harlem R. Co.*, 2 E. D. Smith, 195.

² *Bigelow v. Heaton*, 6 Hill, 43; *S. C.* 4 Denio, 496.

³ *Jeremy on Law of Car.* 33; *Magnin v. Dinsmore*, 62 N. Y. 35.

⁴ *Satterlee v. Groat*, 1 Wend. 272; 3 Barb. 388; *Dwight v. Brewster*, 1 Pick. 50; *Shelden v. Robinson*, 7 N. H. 157; *Blanchard v. Isaacs*, 3 Barb. 388.

⁵ *Allen v. Sewall*, 2 Wend. 327; 6 Wend. 335; *Merritt v. Earle*, 29 N. Y. 115.

⁶ *Hollister v. Nowlen*, 19 Wend. 234, 239; 2 Kent's Comm. 599.

⁷ 10 N. H. 481; 12 Mees. & Welsb. 766; 5 Bing. 217. ⁸ *Jeremy on Car.* 84.

§ 635. The contract generally regulates the payment of freight, and determines when it becomes due. Under an entire contract, freight becomes due on a fulfillment of the agreement according to its terms.¹ Where a vessel is chartered for a voyage out and home, for a specific sum of money to be paid on her return, no freight is earned unless the vessel completes the homeward voyage; because by the agreement of the parties the outward and homeward voyage are one, and the profit depends on the entire performance.² The contract is to be enforced, according to its terms, so as to carry into effect the expressed intention of the parties.

The contract being single and indivisible, as it generally is, freight can only be recovered on a delivery of the goods.³ Being drawn in such terms that the freight is to be paid by weight, measure or package, the contract is divisible, and freight may be collected on the goods delivered.⁴

§ 636. The shipper or consignee, the party in interest, has a right to stand upon the terms of the contract; and a purchaser of the goods while in transit, taking the bill of lading in good faith, and relying upon it for the amounts and quality, is more favorably considered. He is not bound to accept different articles or quantities, nor will his acceptance of a part of the articles, without knowledge of any deficiency, preclude him from asserting his rights under the contract:⁵ he is not bound to receive or pay freight on a different kind of goods from those described in the bill of lading; he has a right, purchasing or making advances on the goods while in transit, to rely upon the statement of fact contained in the bill.⁶ The rule does not apply in favor of an

¹ *Barker v. Cheriote*, 2 John. R. 352; *Scott v. Libby*, 2 John. R. 336.

² *Penoyer v. Hallett*, 15 John. R. 332; *Liddard v. Lopes*, 10 East, 529; *Lorillard v. Palmer*, 15 John. R. 14; S. C. 16 John. R. 348. The contract may be divisible. *Burrell v. Cleeman*, 17 John. R. 72. If the contract so requires, the carrier must unload his wares before he becomes entitled to freight. *N. Y. C. & H. R. R. Co. v. Standard Oil Co.*, 20 Hun, 39; S. C. 87 N. Y. 486; *McCullough v. Hellweg*, 68 Me. 260. And if the carrier has contracted to transport goods and deliver them to the consignee, a complete delivery must be made by him to entitle him to freight. Mere safe carriage of the goods to the place of delivery is not sufficient. *Western Transp. Co. v. Hoyt*, 69 N. Y. 230.

³ *Sayward v. Stevens*, 3 Gray, 97; *The Nathaniel Hooper*, 3 Sumner, 554; *Tirrell v. Gage*, 4 Allen, 245; *Sampago v. Salter*, 1 Mason, 43; *Case v. Baltimore Ins. Co.*, 7 Cranch, 358.

⁴ *Ritchie v. Atkinson*, 10 East, 295; *Christy v. Row*, 1 Taunt. 300; *Price v. Hartshorn*, 44 N. Y. 94; *McGaw v. Ocean Ins. Co.*, 23 Pick. 405.

⁵ *Byrne v. Weeks*, 7 Bosw. 372.

⁶ *Dowes v. Perrin*, 16 N. Y. 325; *Bates v. Todd*, 1 M. & R. 106; *Berkley v. Watkins*, 7 Adol. & Ellis, 29. The master is estopped from denying that he had the goods. *Thompson v. Dening*, 14 Meeson & W. 403.

immediate party to the bill, so as to exclude proof of fraud or mistake in the amount or quality of the goods actually shipped; and hence the carrier may recover freight, on delivering the goods received by him.¹

§ 637. The freight to be paid a ship carrier for transporting goods includes a compensation for lading them;² the vessel need not therefore break ground or start on her voyage, to secure the benefit of the contract. If the shipper demands a redelivery of the goods before the ship sails, as he may do by the usage of trade, he must pay the stipulated freight, besides indemnifying the master against liability on any bill of lading given by him for the goods.³ An attaching creditor seizing the goods is not allowed to withdraw them on any better terms.⁴ The rule is the same where the owner shipping the goods demands and receives them at some intermediate point, before reaching the place of destination, without any waiver of his rights by the carrier.⁵ On the same ground, where the shipper has the goods insured, and the insurer, after a damage covered by the policy, intervenes and takes possession of the goods as for a total loss under the terms of the policy, the carrier being ready and able and willing to continue the transportation to the place of delivery, is entitled to recover freight; *pro rata itineris* where he consents to surrender the goods.⁶ The insurer acts under a right derived from the owner and shipper; and the latter has the right to demand and receive the goods, on paying the stipulated freight. It follows that an acceptance of the goods by the insurer is equivalent to a receipt of them by the shipper; and the acceptance being voluntary, the carrier is entitled to *pro rata* freight.⁷

§ 638. Freight is earned on the delivery of the cargo at the place of destination; and no freight is due on goods which perish by the perils of the sea, during the course of the voyage.⁸ But where a vessel is

¹ Meyer v. Peck, 28 N. Y. 590; 9 N. Y. 529.

² Cutting v. Lyons, 1 Bos. & Pull. 364.

³ Tindall v. Taylor, 28 Eng. L. & Eq. 216; Bartlett v. Carnley, 6 Duer, 194; Campbell v. Conner, 70 N. Y. 424. A shipper of goods on a railroad may resume control of them in a reasonable manner; C. & P. R. R. Co. v. Sargent, 19 Ohio St. 438; the shipper being the owner; Southern Ex. Co. v. Dixon, 15 Albany Law Journal, 491.

⁴ Campbell v. Conner, 70 N. Y. 424.

⁵ Ellis v. Willard, 9 N. Y. 529; case of the ship Hooper, 3 Sumner, 542.

⁶ McKibbin v. Peck, 39 N. Y. 262; Western Transp. Co. v. Hoyt, 69 N. Y. 235.

⁷ Welsh v. Hicks, 6 Cowen, 504; Parsons v. Hardy, 14 Wend. 215; Smyth v. Wright, 15 Barb. 51, and cases there cited. The authority of these cases is not affected by Atlantic M. Ins. Co. v. Bird, 2 Bosw. 195.

⁸ Frith v. Barber, 2 John. R. 327; Bartlett v. Carnley, 6 Duer, 194; Gibson v. Brown, 44 Fed. Rep. 98.

driven by the perils of the sea into an intermediate port, and is unable to proceed to the port of destination, and the owner elects to receive the goods at the intermediate port, freight *pro rata itineris* may be justly claimed on the goods so received.¹ If the carrier offer to hire another vessel on which to forward the cargo, or is able within a reasonable time to repair his own vessel so as to proceed on the voyage, he is entitled to demand his full freight.² But if the master, without sufficient cause, refuses to repair his ship or to send on the goods by another vessel, the owner may demand the goods, and is discharged from freight, both full and *pro rata*.³ To entitle the carrier to *pro rata* freight, there must be a voluntary acceptance of the goods by the owner; for if he be forced or constrained to receive them at the intermediate port, or lying derelict on the shore, this is not such an acceptance of them as will raise an implied promise to pay the freight to that place.⁴

The event on which *pro rata* freight is claimed is not provided for in the contract between the parties. There is not therefore any legal claim to it, on an abandonment of the voyage at an intermediate port, founded on the original contract. The action must be based upon a new or implied contract, arising out of the situation and the acts of the parties. The owner of the goods, having the advantage of a part performance of the original contract, ought to pay for the benefit he has received; and is held liable on an implied contract to that effect, where he voluntarily accepts the goods.⁵

§ 639. When freight is paid in advance, on a contract for the carriage and delivery of goods, and the vessel is captured or shipwrecked, and the voyage broken up, the shipper is entitled to a return of the

¹ Robinson v. Marine Ins. Co., 2 John. R. 324; Smith v. Wright, 15 Barb. 51.

² Luke v. Lynde, 2 Burr. 882; Mulloy v. Backer, 5 East, 316.

³ Smith v. Wilson, 8 East, 437; Hustin v. Union Ins. Co., 1 Wash. C. R. 530; Calender v. Ins. Co. of N. A., 5 Binn. 525; Dunnett v. Tomhagen, 3 John. R. 154. See Hubbell v. Great Western Ins. Co., 74 N. Y. 246. Where a vessel, before commencing a voyage, is so injured by fire that the cost of her repairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, the contract of affreightment is thereby dissolved. The Tornado, 108 U. S. 342.

⁴ The Atlantic M. Ins. Co. v. Bird, 2 Bosw. 195; Kinsman v. N. Y. Mutual Ins. Co., 5 Bosw. 460, 474; Welch v. Hicks, 6 Cowen, 504; 7 Cowen, 564; 9 John. R. 19.

⁵ Welch v. Hicks, 6 Cowen, 504; Parsons v. Hardy, 14 Wend. 215; Smith v. Wright, 15 Barb. 51; 2 Campb. 466; 7 Term, 377; Williams v. Smith, 2 Caines' R. 213; Richardson v. Young, 38 Penn. St. 169; Rogers v. West, 9 Ind. 400; Luke v. Lynde, 2 Burr. 889; Hunter v. Prinsey, 10 East, 394; 13 Mees. & Wels. 229; Liddard v. Lopes, 10 East, 526; Atlantic M. Ins. Co. v. Bird, 2 Bosw. 195; Marine Ins. Co. v. United Ins. Co., 9 Johns. 186; Mulloy v. Backer, 5 East, 316; Western Transp. Co. v. Hoyt, 69 N. Y. 235.

freight; the consideration, the transportation and delivery, having failed.¹ The vessel being disabled on the voyage, the carrier may earn freight by sending forward the goods by another ship.² So where a passenger took ship and paid his passage in advance from Amsterdam to Batavia, and on the voyage the vessel put into New York in distress, and the owner there offered him a passage in another ship, larger and more commodious, to Batavia, and he declined the offer; he was not permitted to recover back any part of the passage money; since it was his own fault that he did not proceed on his voyage. The contract being entire, a return can only be demanded on showing a failure to fulfill its terms.³

Passage money, and freight which is the hire or reward paid to the master and owners of vessels for the transportation of goods, and the price paid to the carrier for the conveyance of goods by land, are regulated by the same general principles, and recoverable under like circumstances.⁴ If there is an agreement between the parties in respect to the freight or hire to be paid, the rights and duties of each grow out of the written stipulations between them.⁵ There being no express contract, the hire or freight becomes due on delivery at the place of destination; and being paid in advance, it may be recovered back, where it is not subsequently earned;⁶ unless the failure to earn freight is caused by the owner of the goods.⁷

§ 640. The goods being damaged on the voyage by causes for which the carrier is responsible, the damages are to be deducted from the freight; either because no freight has been earned, or because the owner of the goods has a counterclaim for the loss he has sustained, and a right to have it deducted from the freight.⁸ The carrier does not perform his contract unless he transports and delivers the goods with

¹ *Watson v. Duyckinck*, 3 John. R. 335; *Phelps v. Williamson*, 5 Sandf. 578; *Emery v. Dunbar*, 1 Daly, 408; *Griggs v. Austen*, 3 Pick. 20. See same principle applied in *Tompkins v. Dudley*, 25 N. Y. 275; *Tirrell v. Gage*, 4 Allen, 245.

² *Rosetto v. Gurney*, 11 C. B. 176; *Shipton v. Thorton*, 9 A. & E. 314; 10 Gratt, 443; 52 Maine, 265.

³ *Detouches v. Peck*, 9 John. R. 210; *Odgen v. Mutual Ins. Co.*, 35 N. Y. 418.

⁴ *Mulloy v. Backer*, 5 East, 321; *Moffatt v. East India Co.*, 10 East, 468; *Ogden v. Mut. Ins. Co.*, 35 N. Y. 418; *Howland v. The Ship Lavinia*, 1 Peters, 123, 126; *Griggs v. Austin*, 3 Pick. 20; *Watson v. Duyckinck*, 3 Johns. 335.

⁵ *Burgess v. Gun*, 3 Harr. & John. R. 225; *Collins v. Union Transp. Co.*, 10 Watts, 384; *Shephard v. De Bernales*, 13 East, 567; 5 Bosw. 460; 7 Ellis & B. 633.

⁶ *Lane v. Penniman*, 4 Mass. 91; 2 Sumner, 589; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Minturn v. Warren Ins. Co.*, 2 Allen, 86; *Benner v. Equitable Safety Ins. Co.*, 6 Allen, 222; 9 Allen, 311; 13 Penn. St. 33; *Briggs v. Vanderbilt*, 19 Barb. 222.

⁷ *Griggs v. Austin*, 3 Pick. 20; 9 John. R. 210.

⁸ *Angell on Car.* §§ 409-413.

diligence and skill; and if through his neglect or default the goods are injured to an amount exceeding the freight, he cannot recover anything for his services, the defense being properly interposed.¹

The carrier is also liable for any deficiency in the amount of the goods received by him; *e. g.*, in a cargo of grain.² The amount received and delivered being ascertained, he must answer for the deficiency;³ as he must where he guarantees the quantity;⁴ or converts a part of the goods to his own use;⁵ or fails without any legal excuse to deliver any portion of them.⁶

An acceptance of the goods by the consignee, on the line of the transit or at the place of destination, does not waive the consignee's action for damages to the property by the carrier's negligence.⁷ Nor does a payment of freight under protest prevent a subsequent action to recover it back.⁸ On these grounds the better opinion is that the consignee cannot reject goods brought to him, and discharge himself from freight, on the ground that they are so much damaged and depreciated that they are not equal in value to the freight.⁹ And it is quite clear that a consignee cannot refuse to receive part of a cargo on the ground that the other part has been lost or injured.¹⁰ A diminution in the contents of casks containing wine, rum or other liquids, by leakage, fermentation or inherent waste, without fault on the part of the carrier, does not diminish his right to recover freight. On the other hand, a diminution in the quantity arising from causes for which he is answerable under his contract, will deprive him of his freight on the part thus lost.¹¹ Receiv-

¹ *Leech v. Baldwin*, 5 Watts, 446; *Humphreys v. Reed*, 6 Whart. 435; *Edwards v. Todd*, 1 Scam. 463; *Ewart v. Kerr*, 1 McMull. 141; 1 Rice, 203; *Dickinson v. Haslit*, 3 Harris & J. 345; *Schureman v. Withers*, Anthon N. P. 330; *Dyer v. Grank Trunk R. Co.*, 42 Vt. 441.

² *Wright v. Baldwin*, 18 N. Y. 428. See *Rhodes v. Newhall*, 126 N. Y. 574.

³ The receipt contained in the bill of lading is *prima facie* evidence of the amount received by the carrier, and may be explained or contradicted. *Abbe v. Eaton*, 51 N. Y. 410. But the carrier may expressly contract to make good any deficiency in the amount receipted for. *Rhodes v. Newhall*, 126 N. Y. 574.

⁴ *Bissel v. Campbell*, 54 N. Y. 353. The amount must be proved like any other fact, by the parties measuring the grain.

⁵ *Ely v. Ehle*, 3 N. Y. 506; *Davis v. Pattison*, 24 N. Y. 317.

⁶ *Schieffelin v. Harvey*, 6 John. R. 170; *Davis v. Pattison*, 24 N. Y. 317.

⁷ *Bowman v. Teall*, 23 Wend. 306; *Withers v. N. J. Steamboat Co.*, 48 Barb. 455; *S. C.* 51 N. Y. 626; *Kent v. Hudson R. R. Co.*, 22 Barb. 278; *Howe v. Oswego & Syracuse R. R. Co.*, 56 Barb. 121.

⁸ *Harmony v. Bingham*, 12 N. Y. 99.

⁹ *Abbott on Ship*. 427; *Bartram v. McKee*, 1 Watts, 39; *Basten v. Butler*, 7 East, 479; *Griswold v. N. Y. Ins. Co.*, 3 John. R. 321; *Herbert v. Hallett*, 3 John. Cas. 93; *Saltus v. Ocean Ins. Co.*, 14 John. 138; *Seaman v. Adler*, 37 Fed. Rep. 268.

¹⁰ *M. S. & N. I. R. Co. v. Bivens*, 13 Ind. 263.

¹¹ *Nelson v. Stephenson*, 5 Duer, 538.

ing the casks in good order, it is for him to show a loss of their contents by some cause for which he is not responsible.¹

§ 641. It is very common for the owner of a vessel, taking in a cargo for a given voyage, to procure a policy on the freight to be earned on the transportation of the goods. In effect, the insurer contracts that the vessel shall be capable of performing the voyage so as to earn her freight money, notwithstanding the perils insured against; and his contract is made upon certain implied conditions, among which are these: that the vessel shall be navigated with skill and vigilance, and that being disabled on the voyage, it shall be repaired where that can be done within a reasonable time, and then continue the voyage and earn the freight money. The same diligence and skill which are due to the shipper are also due to the insurer of the freight money,² or to the insurer of passage money.³

Expressed in another form, the insurer assumes certain risks of loss on the freight, and no others; and he becomes liable for loss in those cases only which fall within the scope of his undertaking, or within the risks assumed by him. Eliminating all causes of loss except those covered by the policy, and the underwriter must answer for the ship's failure to earn freight or passage money by a safe conveyance of the goods and passengers to the place of destination.⁴

The assured may abandon a vessel to the underwriter, when she is injured by the perils insured against, to a *moiety* of her value; that is, when she is so injured that it will cost more than half her value, as stated in the policy, to place her in as good order and condition as she was in when the policy took effect. Having a right to abandon the ship as a technical or constructive total loss, the shipper cannot require him to repair for the purpose of sending on the cargo; and so a total loss of the vessel involves the loss of the freight.⁵ Where the law does not justify the owner in thus abandoning the ship, he cannot by surrendering the goods to the shipper free of freight, establish a right to

¹ *Arend v. Liverpool, N. Y. & Phila. Steamship Co.*, 6 Lans. 457; S. C. 64 Barb. 118; 53 N. Y. 606.

² *Allen v. Mercantile Mut. Ins. Co.*, 44 N. Y. 437; S. C. 46 Barb. 642; *Scottish Marine Ins. Co., v. Turner*, 20 Eng. Law & Eq. 24; *Hugg v. Augusta Ins. Co.*, 7 How. U. S. 604.

³ *Ogden v. N. Y. Mut. Ins. Co.*, 4 Bosw. 447; S. C. 35 N. Y. 418.

⁴ *DeWolf v. State M. F. & M. Ins. Co.*, 6 Duer, 191; *Ogden v. N. Y. Mut. Ins. Co.*, supra; and *Allen v. Mercantile Mut. Ins. Co.*, supra.

⁵ *American Ins. Co. v. Center*, 5 Wend. 45. As to the mode of estimating the cost of repairs and the deduction to be made, one-third new for old, see *Depuy v. United Ins. Co.*, 3 John. Cas. 182; *Dunham v. Com. Ins. Co.*, 11 John. 315; *Peele v. Merchants' Ins. Co.*, 3 Mason, 27; 3 Wend. 658; 1 Cowen, 265; 5 Cowen, 63; 21 Pick. 456.

recover freight on the policy.¹ But where a vessel is insured by one company, and her cargo by another, and the vessel proceeding on her voyage goes ashore in a storm near the place of destination, and becomes a complete wreck; and the owner abandons the vessel and cargo to the respective underwriters, who accept the same; the ship-owner is entitled to recover full freight in an action on the policy, notwithstanding a part of the cargo is subsequently saved from the wreck, in a damaged condition, by the use of other vessels.² The transaction, the abandonment and acceptance of the vessel, and of the cargo, and of the freight list, by the respective underwriters thereon, operated as a transfer of the property.

Disabled on the voyage, after the service has been partly performed, it is the master's duty to earn freight, if he can, by forwarding the cargo by another vessel.³ He is under no such obligation, where no other conveyance can be found at the port of necessity, where no freight has been earned, or where the expense of sending on the cargo by another vessel will exceed a moiety of the freight.⁴

When the master hires another vessel at an intermediate port, to carry forward the goods, the cargo is chargeable on its arrival at the port of destination, with the increase of freight arising from the charter of the new ship; that is to say, rateable freight to the port of distress, and the freight on the new ship, together with the expenses of transshipment. From necessity the master becomes the agent of the owner of the cargo.⁵

§ 642. The carrier has a right to demand payment of his freight as a condition of the delivery of the goods, or final surrender of them to the consignee; and is nevertheless obliged to take proper steps towards making a delivery, so as to give the consignee an opportunity to examine the goods before he accepts them.⁶ The right to retain the goods for the freight grew out of the usage of trade, and is waived by an agreement regulating the time and manner of paying the freight, without reference to the time when the goods are delivered.⁷

¹ *Allen v. Mercantile Mut. Ins. Co.*, 44 N. Y. 437.

² *Buffalo City Bank v. N. W. Ins. Co.*, 30 N. Y. 251.

³ *Kinsman v. N. Y. Mut. Ins. Co.*, 5 Bosw. 460, 472; 9 John. R. 21; *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 246.

⁴ *American Ins. Co. v. Center*, 7 Cowen, 564; 4 Wend. 45.

⁵ *Searle v. Scovell*, 4 John. Ch. R. 218; 4 Wend. 54; *Mumford v. Com. Ins. Co.*, 5 John. R. 262; 2 Duer, 204, 216; *Worth v. Mumford*, 1 Hilton, 1-34.

⁶ *Clarkson v. Coles*, 4 Cowen, 470; *Chandler v. Talbott*, 18 John. R. 157; ante, § 633; *Brittan v. Barnaby*, 21 How. (U. S.) 527; *The Eddy*, 5 Wallace, 481.

⁷ *Chandler v. Talbott*, 18 John. R. 157. See *Ward v. Whitney*, 8 N. Y. 442, as to the effect of a failure to give the security for freight by contract.

§ 643. The party receiving goods under a bill of lading, which is by its terms assignable, becomes thereby a party to its stipulations respecting freight.¹ The bill under which the goods are deliverable to the shipper's order, or to his assigns on paying freight, may be transferred by indorsement from party to party, without rendering each person to whom it is assigned answerable for the freight.² The carrier's contract is in the first instance with the shipper, and afterwards with the assignee holding the bill of lading and receiving the goods under it. The consignee or the indorsee of the bill becomes a party to it when he receives the goods under it;³ and when it is so drawn that the carrier's authority to deliver the goods is conditioned upon the consignee's paying the freight, he cannot deliver without collecting the freight and after that collect it of the consignor;⁴ as where goods are sold and consigned to a purchaser, the consignor retaining no interest in them;⁵ and where the freight should be collected of the consignee as the owner.⁶

Under the contract as evidenced by the bill of lading, the consignor is liable for the freight; the carrier's lien being considered as only an additional security given to him for the freight; so that where he fails to collect his freight of the consignee, without fault on his part, he may collect it of the shipper under the contract.⁷

The consignee acting as an agent does not become liable for the freight from the mere fact of receiving the goods; and yet cannot excuse himself from liability where he receives the goods before his agency is made known to the carrier.⁸

§ 644. A carrier can hardly assign his liabilities under a contract for

¹ *Tobin v. Crawford*, 5 Mees. & Welsb. 235; 9 id. 716.

² *Merian v. Funck*, 4 Denio, 110; *Trask v. Duvall*, 4 Wash. C. C. 184. The contract is the basis of liability for freight. *Martin v. Smith*, 58 N. Y. 672; *N. Y. Nav. Co. v. Young*, 3 E. D. Smith, 187. See *Bills of Lading Act*, 18 & 19 Vict. c. 111; *Smurthwaite v. Wilkins*, 11 C. B. N. S. 842.

³ *Idem*; *Morse v. Pleasant Brothers*, 7 Bosw. 199; ante, § 592. Under a bill of lading directing the delivery of the goods as addressed on the margin or his or their assignees or consignees, "upon paying the freight and charges," the consignee receiving the cargo is liable to the carrier for the freight. *Davison v. City Bank*, 57 N. Y. 81.

⁴ *Thomas v. Snyder*, 39 Penn. St. 317.

⁵ *Krulder v. Ellison*, 47 N. Y. 36; 10 English (Moak), 25.

⁶ *Dart v. Ensign*, 47 N. Y. 619; *Coleman v. Lambert*, 5 M. & W. 502; *Amos v. Temperly*, 8 M. & W. 798; *Barker v. Havens*, 17 John. R. 234.

⁷ *Holt v. Westcott*, 43 Maine, 445; *Shephard v. De Bernales*, 13 East, 568; *Gilson v. Madden*, 1 Lans. 172; *Jobbitt v. Goudry*, 29 Barb. 509; *Wooster v. Tarr*, 8 Allen, 270; *Fox v. Nott*, 6 H. & N. 630; *Collins v. Union Trans. Co.*, 10 Watts, 384.

⁸ *Boston & Maine R. v. Whitaker*, 1 Allen, 497; *Sheets v. Wilgus*, 56 Barb. 662; *Dart v. Ensign*, supra.

the conveyance of goods; and yet where the owner of a canal-boat contracted to carry property from Buffalo to Albany, and in the course of the trip, after he had lost a part of the goods, sold his boat, the remainder of the cargo being on board, to another person, who received the bill of lading and an order from the shippers of the cargo on the consignees for the freight, and then performed the remainder of the trip and delivered the bill of lading with the residue of the property to the consignee; it was adjudged that the purchaser stood in the place of the former owner of the boat in respect to the claim for freight, and could recover only where such former owner could recover, being entitled to freight on the goods delivered and liable to a recoupment of damages on account of the part not delivered. On the transfer here, the shippers gave to the purchaser of the boat an order on the consignee to pay the amount of the freight to him on the delivery of the cargo with the original bill of lading; and the transaction was considered as having substituted the purchaser in the place of the original owner of the boat.¹ The freight is allowed on the wheat delivered, and the substituted carrier can only recover the freight thus earned, after deducting the loss or deficiency.²

Not being recognized by the shipper, a purchaser of a vessel having goods on board for transportation, must naturally assume the liabilities of the former owner; and the shipper may insist upon his contract against a party thus coming into the custody of the goods,³ or upon the liability imposed upon the carrier by the common law.

IX. CARRIER'S LIEN.

§ 645. As a general rule, one who is obliged to receive and carry or perform work on goods has a lien on them. The law which imposes the burden gives also the power of retaining the goods as a security for the services rendered. The carrier's lien is given for the price or hire due for the conveyance of the particular goods on which it rests.⁴ It is a particular or specific lien on the goods for the price of their carriage, entitling the carrier to detain them until that price has been paid. It grew out of a general custom, fostered by the policy of the law for the protection of the bailee and is favored by the courts in furtherance of substantial justice.⁵

¹ *Hinsdell v. Weed*, 5 Denio, 172.

² *Ogden v. Coddington*, 2 E. D. Smith, 317, 326; *Davis v. Pattison*, 24 N. Y. 317.

³ *Mallory v. Burritt*, 1 E. D. Smith, 234; *Hunt v. N. Y. & Erie R. Co.*, 1 Hilton, 228; *Le Sage v. Great Western R. Co.*, 1 Daly 306; 2 Daly, 454, 490.

⁴ *Hartshorne v. Johnson*, 2 Halst. R. 108; *Bacharach v. Chester Freight Line*, 133 Pa. St. 414.

⁵ *Jeremy on Carriers*, 70, 71; *Crommelin v. N. Y. & Harlem R. Co.*, 4 Keyes, 90.

General liens by the carrier are not favored; such as a lien for a general balance, which is not recognized unless it is established by proof of a general usage of trade, so well known and clearly defined as to justify the inference that the parties dealt with each other on the basis of a general lien.¹

§ 646. An innkeeper is allowed to enforce his lien on the goods brought by a guest to his inn, without regard to the ownership of the property.² And it has been urged that, since the carrier like an innkeeper is obliged to receive all goods tendered to him, there is the same reason to uphold the lien in both cases. But it appears to be settled, that no lien can be enforced in favor of a carrier for the conveyance of goods received by him without authority from the owner; on the ground that no service being rendered at his request, there is no basis on which to raise an implied contract to pay for the transportation;³ and therefore no legal demand to be secured by a lien.⁴

§ 647. The carrier acquires a lien on the goods received for conveyance, as soon as his liability attaches; as soon as he receives the goods on a contract of carriage.⁵ The contract being as we have seen entire, the shipper or customer delivering the goods can only take them back on paying the freight.⁶ On the same ground a passenger securing a seat in a coach and delivering his baggage, cannot resume possession of it without satisfying the carrier's reasonable charges.⁷ Of course a delivery of the baggage must be made by a passenger before the lien can attach; it must be made by a person who has paid his fare, or is about to enter on the trip or journey. It should be made after, or in the act of securing his passage.⁸

§ 648. The carrier has a lien on a passenger's baggage for his fare, and may detain it in his possession until the same has been paid; but cannot detain the person of his passenger, and cannot seize any property

¹ *Rushforth v. Hadfield*, 6 East, 519; *Whitehead v. Vaughn*, 6 East, 523; *Holderness v. Collison*, 7 B. & C. 212; *Butler v. Woolcott*, 2 N. R. 64; *Wright v. Snell*, 5 B. & A. 350.

² *Yorke v. Grenaugh*, 2 Ld. Raym. 867; ante, §§ 473, 474; *Johnson v. Hill*, 3 Starkie, 172.

³ *Gilson v. Gwinn*, 107 Mass. 126; *Everett v. Saltus*, 15 Wend. 474; *Fitch v. Newberry*, 1 Doug. Mich. 1; *Clark v. Lowell*, 9 Gray, 231; 20 Wend. 267; *Robinson v. Eaker*, 3 Cush. 137; *Brower v. Peabody*, 13 N. Y. 121.

⁴ *Martin v. Smith*, 58 N. Y. 672.

⁵ *Tindal v. Taylor*, 4 Ellis & B. 219; 28 Eng. Law & Eq. 210; *Keyser v. Harbeck*, 3 Duer, 373; *Davis v. Crawford*, 4 Const. S. C. 401; *Ship Bird of Paradise v. Heyne-man*, 72 U. S. 545. The lien cannot be enforced unless delivery is made at the place agreed upon. *Johnston v. Davis*, 60 Mich. 56; *McCullough v. Hellweg*, 66 Md. 269.

⁶ Ante, §§ 637, 639; 2 E. D. Smith, 195; 10 English (Moak), 25.

⁷ *Higgins v. Bretherton*, 5 Carr. & P. 2.

⁸ Ante, §§ 570-576.

belonging to him which has not been delivered into his custody, as a security for the passage money.¹ The contract for the carriage of the passenger and his baggage is one and entire; and since, in contemplation of law, the compensation for the conveyance of baggage is included in the fare, the carrier has a lien on the baggage for the amount due him.² Whether the delivery of the baggage be considered an independent bailment of goods to be carried, or only accessory to the contract for the carriage of the person, the lien would attach in either case; but on the theory of a separate contract, on which some of the earlier cases were decided, the lien would be confined to the price or compensation for the carriage of the baggage.³

In truth, there is but one contract, which is indivisible, and covers both the freight and fare. In an action of trover against the master of a vessel, for a writing-desk and a trunk, containing wearing apparel, detained for passage money, LAWRENCE, J., said: "The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel; but I think the lien does extend to other property which he may have on board, and that in refusing to deliver them up he is not guilty of any tortious conversion." Passage money and freight are the same thing in legal effect, and there is no lien upon the person for either of them.⁴

§ 649. The carrier has, as we have seen, a specific lien on the goods carried by him, for their transportation; that is, a lien on each parcel for the price of its transportation, capable of being detached from the mass, as the same is delivered, and enforced against the residue.⁵ *E. g.*, after having delivered part of a cargo of coal or a part of a single consignment of grain, the carrier may detain the residue as security for the entire freight.⁶ He cannot do this where the goods covered by the consignment belong to different owners;⁷ or where, though covered by the same consignment, the goods have been sold to different parties.⁸

¹ Wolf v. Summers, 2 Campb. R. 631; Mason v. Thompson, 9 Pick. R. 288; 104 Mass. 117.

² Orange County Bank v. Brown, 9 Wend. 85, 93.

³ Middleton v. Fowle, 1 Salk, 182; 2 Bos. & Pull. 419.

⁴ Wolf v. Summers, *supra*; Sunbolf v. Alford, 3 M. & W. 248; Ramsden v. Boston & Albany R., 104 Mass. 117.

⁵ Close v. Waterhouse, 6 East, 525; 6 East, 622; Schmidt v. Blood, 9 Wend. 268. The point is further discussed in McFarland v. Wheeler, 26 Wend. 467, 478; Boggs v. Martin, 13 B. Monroe, 239; Fuller v. Bradley, 25 Penn. St. 129; New Haven, etc., Co. v. Campbell, 128 Mass. 104; Potts v. N. Y. & N. E. R. R. Co., 131 Mass. 455; Ware River R. R. v. Vibbard, 114 Mass. 447.

⁶ Lane v. Old Colony R., 14 Gray, 143.

⁷ Hale v. Barrett, 26 Ill. 195.

⁸ Wallace v. Woodgate, Ryan & M. 193; Lodergren v. Flight, 6 East, 622; Bernal v. Pim, 1 Gale, 17.

What shall constitute a delivery depends, under some circumstances, upon the intention of the parties. A transfer of goods from a ship to a warehouse, on the understanding that they are not to be considered as delivered until the freight is paid, will not divest the carrier's lien;¹ nor will a landing of goods on a wharf, with a direction to the wharfinger to detain them till the freight is paid.²

§ 650. The right of lien is one of the terms implied by law in the contract; it accompanies the possession, and is not extinguished by a delivery of the goods to an agent with notice of the lien and for the purpose of preserving it; that is, where the carrier has a right to store the goods.³ So, also, the lien of the master of a vessel on a cargo for freight and charges may be assigned; and an action of trover for the cargo cannot be maintained against the assignee, unless before suit brought the lien be discharged, or a tender in satisfaction is made. And the lien is not waived by the mere omission to place the refusal to deliver or to account, on the specific ground of lien; as where the assignee merely omitted to assert the precise nature of the claim.⁴

§ 651. A voluntary surrender of the goods to the owner or consignee operates as a waiver or release of the lien. This results from the very nature of the lien; "namely, a right of one man to retain the property of another in his possession, until his legal charges on it are satisfied."⁵

The lien also ceases where the carrier becomes liable to the owner of the goods for damages to them exceeding the charge for freight.⁶ It is also waived by a contract inconsistent with its assertion; as where it provides for the payment of the freight at a time subsequent to the delivery of the goods, or at a time specified without reference to the time of the delivery.⁷ The lien is not waived by a special agreement provid-

¹ *Bags of Linseed*, 1 Black. 108; *Sears v. Wills*, 4 Allen, 212; *Cuff v. Ninety-five Tons of Coal*, 46 Fed. Rep. 670; *The Eddy*, 72 U. S. 481.

² *Wilson v. Kymer*, 1 Maule & S. 157; *Faith v. East India Co.*, 4 B. & Ald. 630; *Horncastle v. Farran*, 3 B. & Ald. 497.

³ *Western Transp. Co. v. Barber*, 56 N. Y. 544, 548; *Mors-le-Blanch v. Wilson*, 5 English (Moak), 286, 296, BRETT, J.; *Bickford v. Metropolitan S. Co.*, 109 Mass. 151.

⁴ *Everett v. Coffin*, 6 Wend. 603, 608. Refusing on one ground, he cannot after that assume another. *Judah v. Kemp*, 2 John. Cas. 411; *Adams Express Co. v. Harris*, 126 Ind. 73.

⁵ *McFarland v. Wheeler*, 26 Wend. 467; *Herbert v. Hallett*, 3 John. Cas. 93; *Sweet v. Pym*, 1 East, 4; *Dicas v. Stockley*, 7 Carr. & P. 587; *Reineman v. C. C. & B. R. Co.*, 51 Iowa, 338; *Geneva, I. & S. R. R. Co. v. Sage*, 35 Hun, 95; *The Eddy*, 72 U. S. 481; *Egan v. Cargo of Spruce Lath*, 43 Fed. Rep. 480.

⁶ *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441; *Peebles v. Boston & Albany R.*, 112 Mass. 498.

⁷ *Pinney v. Wells*, 10 Vt. 104; *Chandler v. Belden*, 18 John. R. 157; *Trust v. Pirs-son*, 1 Hilton, 292, 297; 2 Bosw. 489, 498; 3 Denio, 590; *Lucas v. Nockells*, 4 Bing. 729.

ing for the payment of freight, where the same is consistent with the continuance of the lien.¹

§ 652. The carrier's lien covers his reasonable charges on the goods, including the amount advanced by him thereon to a former carrier, being *his* reasonable charges upon the goods. The custom and course of business justify a carrier receiving them from another in the line of transit, in advancing the freight which has accrued upon the goods and in afterwards holding them as a security for the total charges on the line; with this qualification that the carrier advancing freight receive the goods, in apparent good order.² A carrier receiving goods that are to be sent forward over successive lines acts for the owner; and though he makes a mistake and sends them forward on a wrong line, the carrier advancing freight upon and thus conveying the goods, is entitled to hold them as a security for his reasonable charges and advances.³

The law and custom justify the last, in a line of successive carriers, in advancing the freight due on the goods; they do not authorize him to advance all claims upon the goods. If a part of the freight has been paid in advance, it cannot be collected the second time.⁴ It is the duty of each carrier to ascertain the authority of the party from whom he receives the property;⁵ and it is no more than just to leave the carrier to his action, where he advances more than is due, on goods received by him from a prior carrier.

§ 653. When the general owner of a vessel parts with her, under a charter-party for a specified time or for a given voyage, and delivers the possession and control of the vessel to the charterer, the latter is considered the owner for the voyage, and has a lien for freight; or he may maintain an action for it where he has delivered the cargo.⁶ The charterer is deemed the owner for the voyage, where he has under the contract the exclusive possession, command and navigation of the ship. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the

¹ The Kimball, 3 Wallace, 37.

² Monteith v. Kirkpatrick, 3 Blatchf. 279; Bissell v. Price, 13 Ill. 408; Bowman v. Hilton, 11 Ohio, 303; Lee v. Salter, Hill & Denio, 163.

³ Briggs v. Boston, etc., R. R. Co., 6 Allen, 246; Western Transp. Co. v. Hoyt, 69 N. Y. 230. But a carrier who has received goods from another carrier with knowledge that the shipper had directed shipment by the first carrier over a different connecting route, has no lien upon the goods either for his own charges or for charges advanced to the first carrier. Hill v. Denver & R. G. R. Co., 13 Colo. 35.

⁴ Travis v. Thompson, 37 Barb. 236; 1 Doug. (Mich.) 1.

⁵ Clark v. Lowell R., 9 Gray, 231.

⁶ Clarkson v. Edes, 4 Cowen, 470; Wilson v. Morgan, 4 Robt. 58, 67; Holmes v. Pavenstolt, 5 Sandf. 97.

voyage, the charter-party is considered a mere affreightment, sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage. In the latter case the responsibility rests on the general owner.¹

If the vessel is in effect let to hire for a voyage or for a term, the charterer acquires for the time being a property in the vessel, and stands in the place of its owner; and is entitled to demand and collect the freight. Whether he is to be considered the owner or not, depends upon the terms of the charter-party, and the interest which is given to the charterer under it.²

§ 654. The carrier's lien is, as we have said, the right to detain the goods entrusted to him, until his hire or reasonable reward has been paid; it is a means of enforcing payment, but does not authorize him to sell the goods for the purpose of paying himself.³ It is neither a *jus ad rem*, nor a *jus in re*, but a simple right of detainer; hence, it is not attachable as personal property, or as a chose in action of the person entitled to it.⁴ True, the carrier has a special property in the goods entrusted to him, whilst in his possession, so that he may maintain an action against any one who interferes with them, or for any injury done to the goods⁵—a remedy given him for the defense of the property, based upon his right of possession.

It is clear that the carrier's lien cannot be separated from his demand for services bestowed upon the goods; it being a right accessory to that demand, accorded to the carrier as a security for its payment.⁶ And as it grows out of the relation between the carrier and his employer, it cannot be continued after that relation has terminated by a tender of the amount due or by a voluntary delivery of the goods.

The interest of the general owner of goods in the hands of a carrier may be reached by his creditors; subject to the carrier's lien. The

¹ *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch, 49.

² *Gracie v. Palmer*, 8 Wheat. 605; *Hutton v. Bragg*, 7 Taunt. 14; *Mactaggert v. Henry*, 3 E. D. Smith, 390.

³ *Yelv.* 67; *Jones v. Thurloe*, 8 Mod. 172; *Jones v. Pearle*, 1 Str. 556; *Chase v. Westmore*, 5 Maule & Selw. 185; 5 Wend. 33.

⁴ *Meany v. Head*, 1 Mason, R. 319. The demand for the freight may be reached by a creditor of the carrier. *Ante*, § 316.

⁵ *Taylor v. ———*, 2 Ld. Raym. 792; *ante*, § 614; *Fitzhugh v. Wyman*, 9 N. Y. 559; *Merrick v. Brainard*, 38 Barb. 574.

⁶ *Meany v. Head*, 1 Mason, 319; *ante*, §§ 101-105. When a general owner brings an action for injury to the goods, the carrier's lien is no defense unless it is interposed by his authority. *Ames v. Palmer*, 42 Maine, 197.

goods may be taken on an attachment, or the carrier may be summoned as a trustee for the owner;¹ or the goods may be taken from the carrier by the true owner, in an action of replevin, so as to defeat his lien.²

X. REMEDIES AGAINST THE CARRIER.

§ 655. In an action against a common carrier for refusing to receive goods for carriage, it is necessary that the complaint should allege facts sufficient to constitute a cause of action; it must allege that the defendant was a common carrier, at the time in question, of goods and chattels of the kind tendered to him, specifying his route; that the plaintiff tendered to him as such common carrier at a certain place, to be named, where he was accustomed to receive such articles, goods of a certain value for carriage to a given place on his route; that the defendant had the convenience for receiving and conveying the same as requested; that the plaintiff was ready and willing, and then offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt and carriage of the goods; and that the defendant, not regarding his duty as such common carrier, neglected and refused to receive and carry the goods; whereby the plaintiff was forced and compelled to carry the goods himself at great expense, and was injured and damaged to the amount sought to be recovered.³

It is not necessary to aver a strictly legal tender, a term which is only applicable where an absolute duty, such as the payment of an antecedent debt, is imposed on the party making it. The acts to be done by both parties, namely, the receipt of the goods, and the payment of a reasonable sum for their carriage, being contemporaneous acts; the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded, on the carrier's taking charge of the goods; it is enough to aver readiness and an offer to pay. It would be repugnant to common sense to require the party offering goods for carriage to go through with the useless ceremony of laying down the money, in order to take it up again, where the party to whom they are offered refuses to accept the goods.⁴

§ 656. Where the carrier's service is to be performed mainly within

¹ Adams v. Scott, 104 Mass. 164; Van Winkle v. U. S. Mail S. Co., 37 Barb. 221.

² Bliven v. Hudson River R. Co., 36 N. Y. 403; 37 Barb. 122.

³ Pickford v. The Grand Junction Railroad Company, 8 Mees. & Welsb. R. 372. The substance of the declaration in this case is stated in the text; the action was decided on a special demurrer, assigning for cause that plaintiff did not aver a tender; held that the law does not demand in such a case a strictly legal tender.

⁴ Rawson v. Johnson, 1 East R. 203; 7 Taunt. R. 314; 2 Bos. & Pull R. 447.

the limits of tidewater, the proceedings against him may be had in admiralty, either *in rem* against his vessel, or *in personam* against the master and owners. The principles applicable are the same as at common law. The libel, in the form of a petition to one of the judges of the court, sets forth the cause of action with proper allegations to bring the action within the jurisdiction of the court. The answer of the respondents, in form very nearly the same as in equity practice, is then filed, admitting the allegations, which are not denied and averring the facts constituting the defense.¹

§ 657. But the usual remedy against the carrier is by an action at law, grounded either on the contract, as an action of assumpsit, or on his public duty, as an action on the case.² The action in the nature of trover may also be sustained against him, where it can be shown that he has been guilty of a conversion of the property.³

The breach of his public duty is a tort, for which the carrier is liable to an action on the case, founded upon the custom.⁴ Since the abolition of the forms of actions and pleadings heretofore used in this State, we have nominally no distinction between one kind of action and another; but inasmuch as the law establishing the rights of parties remains unchanged, it is still just as essential and important as ever that the pleadings should be drawn so as to raise a right of recovery recognized by the law.⁵ In doing this it is indispensable that every fact should be alleged which is requisite to constitute the cause of action.⁶ If more than one cause of action be stated in the complaint, each cause of action must be stated separately; and so in respect to the answer, each defense or ground of defense must be stated separately.⁷

Under the new procedure the plaintiff may unite several causes of action in the same complaint, where they all arise out of contract, express or implied; but he cannot allege in the same complaint a cause of action arising on contract, and another for injury to property, with or without force; nor can he in an action to recover personal property,

¹ The New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston, 6 Howard's Rep. 344; Citizens' Bank v. Nantucket Steamboat Co., 1 Story R. 16.

² Ross v. Johnson, Burr. 2825; Nolton v. Western R. R. Co., 15 N. Y. 444; Merritt v. Earle, 29 N. Y. 115. The liability of a carrier for non-delivery of goods may be enforced in either form of action. Catlin v. Adirondack Co., 11 Abb. New Cas. 377.

³ Baldwin v. Cole, 6 Mod. R. 212; Richardson v. Atkinson, 1 Str. R. 576; Packard v. Getman, 6 Cowen R. 757; Tolano v. Steam Nav. Co., 5 Robt. 318.

⁴ Jeremy on Car. 116. See Rich. v. N. Y. C. & H. R. R. Co., 87 N. Y. 395.

⁵ Hall v. Southmayd, 15 Barb. R. 32.

⁶ Barker v. Russell, 11 Barb. R. 304; 7 id. 80; Russell v. Clapp, 7 id. 482.

⁷ Boyce v. Brown, 7 Barb. R. 80.

with or without damages for the withholding thereof, insert a count for injury to the same.¹

In general, the plaintiff must now state in his complaint all the facts which constitute his cause of action, whether arising *ex contractu* or *ex delicto*; and every fact is to be deemed constitutive, in the sense of the Code, upon which the right of action depends. Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred; and every such averment must be understood as meaning what it says, and, consequently, is only to be sustained by evidence which corresponds with its meaning.²

§ 658. *Action on the Case.* This form of action, against common carriers, is of very ancient use, and proceeds on the theory of charging them with the breach of a public duty, growing out of their employment, and imposed by law. The action is in some respects more convenient than an action founded on contract, which is of modern use.³ The action on the case is for a tort or misfeasance, while a suit in assumpsit is always brought for the breach of either an express or implied promise.

The form of action against a common carrier is a question which has been considerably agitated in the English courts, and has been different as the *gravamen* was supposed to arise upon a breach of public duty, or the breach of mere express promise. Each form has its advantages and disadvantages. If assumpsit is brought, or the action be laid as arising upon contract, it may be abated for the non-joinder of proper parties; but it survives against the personal representatives, and the common counts, on a general undertaking may be joined in the declaration. If the action be laid as arising *ex delicto*, and founded on the custom, the suit does not abate for the non-joinder of all the proper parties; and, in a proper case, a count in the nature of trover may be joined.⁴

In an action against six defendants, as proprietors of a steamboat, in which they were charged as common carriers, for the loss of property put on board for transportation, and the *gravamen* was stated to have arisen from a breach of duty, it was held that a plea in abatement for the non-joinder of other proprietors, who were jointly liable with the

¹ See Code of Civil Procedure, § 484; *Colwell v. N. Y. & Erie R. R. Co.*, 9 How. Pr. 311.

² *Garvey v. Fowler*, 4 Sand. R. 665; *Bristol v. R. & S. R. R. Co.*, 9 Barb. 158.

³ *Bretherton v. Wood*, 3 B. & Bing. R. 54.

⁴ *Orange Bank v. Brown*, 3 Wend. R. 158; *Boson v. Sandford*, 2 Show. 475; 1 Show. 29, 101; 3 Mod. 321; 2 Salk. 440.

defendants, was bad; that the action being several as well as joint, the demurrer to the plea in abatement was well taken.¹

§ 659. An action solely upon the custom is an action of tort, in which all or any number of the owners of a vessel, coach or other kind of conveyance, used by common carriers, may be sued, and on a verdict against all or a part only of those against whom the action is brought, judgment may be rendered. The plaintiff has his choice of remedies, either to bring an action in the nature of assumpsit or case; but when one or the other form of action is adopted, it will be governed by its own rules. If the plaintiff, as is sometimes done, states the custom, and also relies on an undertaking, general or special, the action, though it may be said to be *ex delicto quasi ex contractu*, is in reality founded on the contract, and is treated as such.²

In an action on the case founded on the custom, the complaint alleges that the defendant was a common carrier of goods and chattels on a certain route, and that plaintiff's goods were delivered to him for carriage to a given place for a certain freight and reward, whereby it became the defendant's duty to carry and deliver the goods safely at the place of destination, and concludes by alleging a breach of duty to the plaintiff's damage. The plea or answer is, not guilty of the breach of duty.³ A breach of this duty is a breach of the law; and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.

It is not necessary in such an action to prove a contract, nor even to allege a consideration, for the negligence or breach of duty is the cause of action, and not the assumpsit.⁴ It is sufficient, therefore, to establish,

¹ *Orange Bank v. Brown*, 3 Wend. R. 158.

² *Max v. Roberts*, 12 East R. 89, decided in 1810. For a discussion of what are sometimes termed "torts founded upon contract," see *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382; *Addison on Torts* (6th ed.), 16. A complaint against a carrier, which alleges that the defendant's business was to carry goods for hire; the delivery of goods to the defendant; the payment of charges; the undertaking of defendant to deliver; the loss of the goods; and the amount claimed, with interest, states a cause of action upon contract. *Catlin v. Adirondack Co.*, 11 Abb. New Cas. 337; *Reversing S. C.* 20 Hun, 19. The liability of the carrier is the same whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same; and where there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is co-extensive with the liability on the contract. *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, 134, 135.

³ *Bretherton v. Wood*, 3 Brod. & Bing. R. 54, decided in 1821; *Jeremy on Car.* 117; *McCall v. Forsyth*, 4 Watts & Serg. (Penn.) R. 179; *Smith v. Seward*, 3 Barr. R. 342.

⁴ *Bastard v. Bastard*, 2 Show. 81; *Jeremy on Car.* 5; 3 Brod. & Bing. R. 54.

by pleading and proof, that the defendant received the plaintiff's goods as a common carrier for transportation, and has been guilty of a breach of his duty, resulting in damages to the owner of them.¹ Without any agreement whatever, the bare delivery of the goods to the carrier, imposes upon him the obligation to convey and deliver them according to the directions which he receives; and a neglect to perform his duty and comply with such directions subjects him to an action. For the law pronounces his failure in duty a tort or misfeasance, for which he must answer in damages to the party injured.²

§ 660. There is this further convenience attending an action on the case; it is enough that the proof conforms substantially to the averments in the complaint; ³ while in an action on a contract the proof must conform closely to the allegations, and a variance will be extremely inconvenient, if not fatal.⁴

It has also been customary, and in many cases found quite convenient, to join in this action with counts against the defendant as a common carrier, a count in trover.⁵ Trover was held to lie where the goods had been lost to the owner by the act of the carrier, though without any intentional wrong; as where they had been delivered to the wrong person by mistake, or on a forged order, or had been tortiously converted by him.⁶ It did not lie for the mere omission of the carrier; as where the property has been stolen, or lost through his negligence, and so could not be delivered to the owner. Mere nonfeasance does not work a conversion of the property; and hence, although the owner might maintain an action of another kind, it was ruled that he could not maintain trover.⁷ A recovery on a count in trover could be had only where the defendant had been guilty of an act of conversion. The goods being in his possession, evidence of a demand and refusal is *prima facie* proof

¹ Weed v. The S. R. R. Co., 19 Wend. R. 540. Plaintiff's ownership of the goods should be alleged. Pennsylvania Co. v. Poor, 103 Ind. 553.

² Coggs v. Bernard, 2 Ld. Raym. 909. See also the old forms of a declaration in case against a common carrier, 1 Chitty Pl. 248. Proof that goods were delivered to a carrier in good order and were received from him in bad order is enough, without more, to sustain a finding of negligence. Koenigsheim v. Hamburg Am. Packet Co., 12 Daly, 123.

³ Cook v. The Champlain Trans. Co., 1 Denio R. 91; Wyld v. Pickford, 8 Mees. & Welsb. R. 443.

⁴ Weed v. S. & S. R. R. Co., 19 Wend. R. 540.

⁵ Hawkins v. Hoffman, 6 Hill R. 586.

⁶ Youl v. Harbottle, Peake Cas. 49; Devereux v. Barclay, 2 B. & Ald. 702; Stephenson v. Hart, 4 Bing. 476.

⁷ Ross v. Johnson, 5 Burr. 2525; Dewell v. Maxon, 1 Taunton R. 381; Anon. 4 Esp. R. 157; Buller, N. P. 45; 1 Campb. R. 409; 2 Ld. Raym. 792; Jeremy on Car. 120; Magnin v. Dinsmore, 70 N. Y. 410; Scovill v. Griffith, 12 N. Y. 509.

of conversion.¹ This proof may be overcome by any testimony that shows he did not in fact convert them.

§ 661. It is not easy to determine how far, under the Code of Procedure in this State, causes of action formerly capable of being joined may now be united in the same complaint. In general terms, it may be stated that the plaintiff cannot, in an action to recover personal property, allege a cause of action for injury to property, arising through his neglect with or without force. In an action for the recovery of goods and chattels he may claim "damages for the withholding thereof;" and he may include under that term such damages as have resulted from the negligent manner in which the defendant has stored or transported them.²

But the form of the action does not alter the transaction, nor essentially vary the principles applicable to the carrier's liability. Under the old practice, the true test, whether counts might be joined in the same action, was to consider whether there might be the same judgment in both or all of them.³

§ 662. *Action on the Contract.* An action of assumpsit lies upon all implied contracts as well as upon all written contracts not under seal, and is based upon the promise or undertaking of the party defendant. It is the usual and well defined remedy for the breach of a contract, whether expressed in terms or raised by implication of law.

Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. There is an implied undertaking on his part to carry the goods safely, and on the part of the owner to pay a reasonable compensation. No special agreement is necessary to enable the owner to maintain assumpsit against the carrier for the breach of his duty, nor to enable the carrier to maintain assumpsit for his compensation. There is, therefore, a perfect contract implied between the carrier and his employer.⁴ In like manner a contract to carry the ordinary luggage of the passenger is implied from the usual course of the business; and the price paid for fare is considered as including a compensation for carrying the freight.⁵

§ 663. It is customary and proper, in an action against the carrier, founded on his contract, to allege by way of inducement that the defend-

¹ Dwight v. Brewster, 1 Pick. R. 50; Hawkins v. Hoffman, 6 Hill, 586.

² Code of Civil Procedure, § 484; Smith v. Orser, 43 Barb. 187.

³ Dickson v. Clijton, 2 Wils. 319; Covett v. Radnidge, 3 East R. 63.

⁴ Orange Bank v. Brown, 3 Wend. 158, 161.

⁵ Orange County Bank v. Brown, 9 Wend. 85; Pardee v. Drew, 25 Wend. 459; Hawkins v. Hoffman, 6 Hill, 586.

ant was a common carrier of goods and chattels, specifying his route;¹ and that the plaintiff delivered to him as such common carrier, and at his request, certain goods, describing them with a certainty of description to a common intent, and specifying their value, to be securely carried and safely delivered to the consignee at the place of destination, to be named; that the defendant in consideration thereof, and of the reward to be paid to him in that behalf, undertook and faithfully promised the plaintiff to take care of the said goods and chattels, and safely and securely carry and convey, and deliver them for the plaintiff according to his undertaking, and the complaint then concludes by alleging a breach of the undertaking by the defendant, neglecting and not regarding his duty as such carrier. To this is commonly added a general count for not taking due and proper care of the goods; and such other counts, grounded on the contract, as may be applicable to the case.²

Proceeding upon a contract, it is necessary to sue all the joint contracting parties, and only such as are liable on the same contract; and the contract must be proved as laid in the complaint.³ As every legal and valid promise must be supported by a consideration, it is essential that the complaint should aver a consideration as well as an undertaking,⁴ and that the consideration should be correctly stated according to the terms of the agreement.⁵

§ 664. A contract in the alternative, to transport fifteen or twenty tons of marble from one place to another, must be stated in the declaration according to the terms of it. If stated as an absolute contract for the transportation of twenty tons, and not fifteen or twenty tons, the variance is fatal, under the common law practice.⁶ So, where the declaration stated that, in consideration of thirty-five dollars to be paid by the plaintiff, and the agreement of the plaintiff to pay the defendant three dollars per ton, and such canal tolls as should be charged to the defendant, the defendant agreed to transport twenty tons of marble from Fort Ann to Weedsport; and the agreement proved was to transport twenty tons for three dollars per ton and the tolls, and that the thirty dollars should be advanced towards the tolls; the variance was considered substantial and manifest.⁷ It is a sufficient averment of a consideration that the defendant, being a common carrier, for a certain

¹ 1 Chitt. Pl. 115, 418; 2 id. 335, 7th ed.

² Pozzi v. Shipton, 8 Adolph. & Ellis R. 963. See Catlin v. Adirondack Co., 11 Abb. New Cas. 337.

³ Patten v. Magrath, 1 Rice (S. C.), R. 162; Walcott v. Canfield, 1 Conn. R. 194.

⁴ Corbett v. Packington, 6 Barn. & Cres R. 268; Smith v. Seward, 3 Bay R. 342.

⁵ Stone v. Knowlton, 3 Wend. R. 374; Penny v. Porter, 2 East R. 2.

⁶ 3 Wend. R. 374.

⁷ Stone v. Knowlton, 3 Wend. 374; Tate v. Whellings, 3 Term. R. 531.

hire or reward, received the goods for carriage.¹ If the carrier limits his responsibility, that need not be noticed in the pleading; but if a stipulation be made that, under certain circumstances, as in the case of fire and robbery, he shall not be liable at all, that should be stated.²

In brief, when the action against the carrier is based on the contract, either expressed or implied, between the parties, it is sufficient here to say, that the general principles which have been held to govern the action of *assumpsit* become applicable; and the plaintiff has the right of uniting in the same suit as many causes of action against the defendant as he may have, belonging to the same class.³ If the action be brought against several, he must establish a joint liability against all the persons whom he has sued, and the contract must be proved as stated.⁴ Though he cannot in the same action state a cause of action not in the same class, he may recover on any evidence which shows a breach of the contract, whether arising through the neglect or wrongful act of the defendant;⁵ and the evidence is substantially the same as that required in an action on the case.

§ 665. *Parties to the Action.* The contract for carriage of goods implied by law is with the owner of them, and hence the action of *assumpsit* for the enforcement of the contract should be brought in his name, whether he be the consignor or consignee of the goods.⁶ Having the legal title, he has the right of action.⁷ The consignor cannot bring the action for a loss of the goods, where the title passes to the consignee, on the delivery of them to the carrier; as it does where a merchant sends a written order for goods, with directions to send them by canal or by rail, and they are sent accordingly.⁸ The sale being valid, a delivery to the carrier operates as a delivery to the purchaser; the prop-

¹ *Clark v. Gray*, 6 East R. 564.

² *Latham v. Rutley*, 2 Barn. & Cres. R. 20. See *Lake Shore, etc., Ry. Co. v. Bennett*, 89 Ind. 457; *Hall v. Pennsylvania Co.*, 90 Ind. 459.

³ Code of Civil Procedure, § 484.

⁴ *Wilsford v. Wood*, 1 Esp. R. 182.

⁵ *Sleat v. Fagg*, 5 Barn. & Ald. R. 349. See *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, 134, 135.

⁶ *Jeremy on Car.* 123; *Price v. Powell*, 3 N. Y. 322; *Greene v. Clark*, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 36; *O'Neill v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 138. This is the general rule. It has some exceptions. Where the consignor, although not the general owner, has a lien upon or special interest in the goods and makes the contract and pays the consideration for the carriage, he may bring an action for a breach of the contract in his own name in order to protect his rights. *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206.

⁷ 1 Chitty Pl. 1; *Ely v. Ehle*, 3 N. Y. 506; *Duff v. Budd*, 6 Moore, 469; *Stephen-son v. Hart*, 4 Bing. 476.

⁸ *Krulder v. Ellison*, 47 N. Y. 36; *Magruder v. Gage*, 33 Md. 344.

erty immediately vests in him, and he alone can bring an action for any injury done to the goods ;¹ they are at his risk ; the vendor retains only the right to stop them in their transit, in case the purchaser becomes insolvent before they reach him.

On a verbal sale of specific goods or chattels a delivery of them to the carrier chosen or designated by the purchaser, satisfies the statute of frauds ; because here the purchaser names the person or party to whom the delivery is to be made, and the delivery being so made, the sale is complete and the title passes.²

On the other hand, where the buyer gives a verbal order for goods without examining them, and directs them to be sent to him without naming the carrier, a delivery of them to a carrier is not sufficient to satisfy the terms of the statute. The title does not pass on the delivery to the carrier.³ And for the same reason, where an order is given for a certain quantity of goods, of a given quality, and there has been no selection or separation of them from the bulk, a delivery by the seller to the carrier named by the purchaser does not satisfy the statute ; because the carrier is not appointed as the buyer's agent to accept the goods within the meaning of the statute.⁴ The purchaser must accept and receive, in order to render the sale valid and vest the title in him.⁵

§ 666. When goods are shipped for the account and risk of the consignee, he paying the freight, and it is so expressed in the invoice and bill of lading, the delivery to the carrier is considered as a delivery to the consignee, and he alone can bring an action against the carrier for a failure to deliver the goods. No other fact appearing, the consignee is to be treated as the owner of the property.⁶ The goods being placed at his absolute disposal, the legal presumption is that he is the owner ; and though not the absolute owner he may recover the goods against any party not claiming under the true owner.⁷

¹ Dutton v. Solomonson, 3 Bos. & Pull. 584; Ilsley v. Stubbs, 9 Mass. 63.

² Cross v. O'Donnell, 44 N. Y. 661; Glen v. Whitaker, 51 Barb. 451; People v. Haynes, 14 Wend. 546.

³ Rodgers v. Phillips, 40 N. Y. 519; Maxwell v. Brown, 39 Maine, 98; Frostburgh M. Co. v. N. C. Glass Co., 9 Cush. 115. The consignee in such case has no right of action based on the loss of the goods. O'Neill v. N. Y. C. & H. R. R. Co., 60 N. Y. 138.

⁴ Norman v. Phillips, 14 Mees. & Welsb. 278; Mendith v. Meigh, 2 Ellis & B. 364; Allard v. Greasert, 61 N. Y. 1, 5.

⁵ Caulkins v. Hellman, 47 N. Y. 449; Stone v. Browning, 51 N. Y. 211; Brand v. Focht, 3 Keyes, 409.

⁶ Potter v. Lansing, 1 John. R. 215; Sweet v. Barney, 23 N. Y. 335; Thompson v. Fargo, 49 N. Y. 188; 63 N. Y. 479.

⁷ Fitzhugh v. Wiman, 9 N. Y. 559; Green v. Clark, 12 N. Y. 343.

Between the parties to it, the contract embodied in a bill of lading cannot be varied by parol evidence: as against other parties, it is of no force. It cannot therefore be used to defeat the true title to the property, as against any third party.¹

When the consignor acts as an authorized agent in shipping goods, he is considered as having authority to agree upon the terms of transportation;² and the stipulations agreed upon by him will bind his principal.³

§ 667. On a sale of goods to be carried and delivered to the vendee at his place of business, the carrier's contract is with the vendor; the vendor assuming the expense of the transportation.⁴ And so in like cases, where the title does not pass on a delivery to the carrier; the bailor is entitled to enforce the contract with the carrier.⁵

We need not consider the subject further in this connection. The consignor shipping his own goods has the right to enforce his contract with the carrier; and he has the right to transfer that contract, with the goods covered by it, so as to vest in the transferee the title and give him the usual remedies for any injury to the property, or for a conversion of it.⁶

When the plaintiff brings an action of assumpsit, he must take care to bring his suit against all who are jointly liable on the contract; and he must also take care not to make any persons parties defendant, who are not liable on the contract.⁷

§ 668. *Burden of Proof.* The burden of proof is imposed upon one party or the other, by the substance and form of the pleadings.⁸ Upon *non-assumpsit* pleaded to an action on contract, the plaintiff holds the affirmative of the issue, and the *onus* of making out a promise is upon him; but he does not hold the affirmative upon all the issues that may arise in the action. The defendant, without controverting the promise, may set up in his plea or answer, payment, release, or an accord and

¹ Covell v. Hill, 6 N. Y. 374; Everett v. Saltus, 15 Wend. 474; 20 Wend. 267; Brewer v. Peabody, 11 How. Pr. 492; 13 N. Y. 121; M. & T. Bank v. F. & M. Nat. Bank, 60 N. Y. 40.

² Nelson v. H. R. R. Co., 48 N. Y. 498.

³ White v. Ashton, 51 N. Y. 280.

⁴ Dunlap v. Lambert, 6 Cl. & F. 600; N. Y. Fireman's Ins. Co. v. DeWolf, 2 Cowen, 56, 105; Ludlow v. Bowne, 1 John. R. 1; Davis v. James, 5 Burr. 2680.

⁵ Gilbert v. N. Y. Central & Hudson R. R. Co., 4 Hun, 378; Coyle v. Western R. Co., 47 Barb. 152.

⁶ Western Transp. Co. v. Hawley, 1 Daly, 327; Cayuga County Nat. Bank v. Daniels, 47 N. Y. 631; Dows v. Greene, 24 N. Y. 638; Williams v. Tilt, 36 N. Y. 319.

⁷ Mitchell v. Ostrom, 2 Hill, 520; Jeremy on Car. 124.

⁸ Hollister v. Bender, 1 Hill, 150.

satisfaction;¹ and when he does so, the burden of proof is upon him to establish his allegation by a preponderance of evidence. The same rule holds in relation to any new matter constituting a defense or counterclaim, interposed by the defendant. The burden of proof rests with the party making an allegation or asserting a fact.²

It is a general rule of pleading, that a fact asserted on one side, and not denied on the other, is to be taken as admitted; and so the issue to be tried by a jury consists of one or more facts affirmed on one side, and denied on the other.³ In actions against common carriers, it is necessary to prove, first, a contract express or implied; second, the delivery of the goods; and third, the defendant's breach of promise or duty.⁴ If the plaintiff counts on a special agreement, it must be proved as laid, and no other will be implied.⁴ And if the plaintiff bring an action of tort, as for a conversion of the goods, he can only recover on proving the cause of action alleged by him in his complaint.⁵

§ 669. The plaintiff usually relies upon an implied contract, proving that the defendant is a common carrier, as alleged in the declaration, and that the goods were delivered to him for carriage to the place named, and that they have not in fact arrived.⁶ Having shown a state of facts from which the law implies a contract on the part of the carrier to carry and deliver the goods safely at their place of destination, slight evidence is sufficient to cast the burden of proof upon him to answer for the non-delivery. Evidence that the defendant's coachman, on being inquired of for a parcel entrusted to him for carriage, replied that he understood it had been lost, is sufficient in the first instance.⁷ And the testimony of the consignee's shopman, that he did not know of the delivery, and believed that he must have known of it if a delivery had taken place, is *prima facie* evidence of non-delivery.⁸ Though the burden of proof is on the plaintiff to show that the property did not safely

¹ McKyring v. Bull, 16 N. Y. 297; 33 N. Y. 429; 5 Duer, 389; 21 Barb. 275; White v. Smith, 1 Lansing, 469.

² Buswell v. Poiner, 37 N. Y. 312; Greene v. Waggoneer, 2 Hilton, 297; Johnson v. Plowman, 49 Barb. 472; Wakeman v. Sherman, 9 N. Y. 85; Dunham v. Pettee, 8 N. Y. 508; Heilman v. Lazarus, 90 N. Y. 672; Heinemann v. Heard, 62 N. Y. 448; Roberts v. Chittenden, 88 N. Y. 33.

³ Raymond v. Wheeler, 9 Cowen, 295, 302; N. Y. Code of Civil Procedure, § 522; 2 Starkie Ev. § 282, 3d ed.; 2 Greenleaf's Ev. §§ 209, 213.

⁴ Latham v. Rutley, 2 Barn. & Cress. 20.

⁵ Tolano v. National Steam Nav. Co., 5 Robt. 318.

⁶ Tucker v. Cracklin, 2 Starkie C. 385.

⁷ Mayhew v. Nelson, 6 Carr. & Payne R. 58; Morse v. Conn. River R., 6 Gray, 450. Some evidence of non-delivery must be given before the carrier can be called upon to prove delivery. Roberts v. Chittenden, 88 N. Y. 33; The Falcon, 3 Blatchf. 64.

⁸ Griffiths v. Lee, 1 Carr. & Payne R. 110.

reach its destination, it is not material how the fact is proved. Where it was shown that the defendant's boat, in which the property was stowed, had been capsized on the route and the property damaged, and a portion of it carried to a place out of its course, it was ruled sufficient to throw the burden of proof on the defendants to account for the property.¹

Upon proof of a delivery of goods to a common carrier for transportation, accompanied with evidence that they have not been delivered at their place of destination after a reasonable time, the carrier is called upon to account for the goods, and render a legal excuse for the non-performance of his contract.² For, from the moment he receives the goods into his custody, everything is negligence in the carrier which the law does not excuse.³ And where he has not limited his liability by special contract, the law excuses him in only two instances; namely, where he is prevented from fulfilling his engagement by the act of God or of public enemies.⁴

§ 670. In respect to goods delivered to one who is not a common carrier, for conveyance from one place to another without hire, the presumptions are different; and the bailee may excuse himself for a loss by evidence of his own acts and declarations immediately before and after the loss; that is to say, these are to be received in evidence as a part of the case, which the jury are at liberty to consider.⁵ Such declarations, to become a part of the *res gestæ*, must have been made at the time of the act done, or directly after, and must have been so made as to qualify and explain the act, and so harmonize with it as to constitute really one transaction.⁶

In an action against a bailee without hire, on an undertaking to carry and deliver a sealed letter containing money, the plaintiff must prove a loss of the package by the defendant's gross or culpable negligence, or

¹ Day et al. v. Riddley et al., 16 Verm. R. 48. Non-delivery may be proved in various ways; as by proving that the carrier did not bring the goods to the place of delivery; Schroeder v. Hudson R. R. Co., 5 Duer, 55; or by proving that the carrier failed on request to give any account of the goods; Westcott v. Fargo, 6 Lans. 319; 63 Barb. 349; or by proof of his refusal to deliver; Newstadt v. Adams, 5 Duer, 48; ante, § 611.

² Dale v. Hall, 1 Wils. 281.

³ Rich v. Kneeland, Hob. 18; Batson v. Donovan, 4 Barn. & Ald. 21; McArthur v. Sears, 21 Wend. 190; Williams v. Grant, 1 Conn. 487. Proof of the delivery of goods to the carrier in good order and that they were received from him in bad order is sufficient to show negligence. Koenigsheim v. Hamburg Am. Packet Co., 12 Daly, 123.

⁴ Jeremy on Car. 31, 32.

⁵ Tompkins v. Saltmarsh, 14 Serg. & Rawle, 275.

⁶ Enos v. Tuttle, 3 Conn. R. 250; Moore v. Meacham, 10 N. Y. 207.

that he has broken the seal and appropriated the money to his own use.¹ Having demanded the money or goods before bringing his suit, the plaintiff may establish his cause of action by showing the circumstances, together with the defendant's failure to restore or to account for the money or property.² On proof of a total failure to deliver the goods bailed, on demand, the *onus* of accounting for the default lies with the bailee: it is otherwise where the cause of the loss appears in evidence, and is consistent with reasonable diligence on the part of the bailee. The presumptions are much stronger against the common carrier, who must account for the property, or show a loss of it from causes for which he is not liable under his contract, or under the common law.³

§ 671. In actions against a common carrier, on a special acceptance by him limiting his liability, the plaintiff must set forth the contract according to its terms; and his evidence must be *prima facie* sufficient to establish the allegations in his complaint.⁴ He must prove an injury to the goods or a loss of them, or a failure to deliver; he must support his complaint by evidence, which, being unexplained, raises the presumption that the goods were lost or damaged by the carrier's failure to fulfill his contract. It then rests with the carrier to show that the injury or loss was caused without fault on his part; since without evidence it cannot be presumed that the injury or loss is covered by the exemption contained in the contract.⁵

The plaintiff must prove, as well as allege, the facts which constitute his cause of action; but he cannot from the nature of things prove a negative fact with the same certainty, or with the same species of evidence with which he may establish an affirmative fact.⁶ And hence the plaintiff may prove a loss of a package or parcel by the carrier's negligence, by showing his failure to deliver it to the owner at the place of destination. The presumption of a loss by negligence arises

¹ Beardslee v. Richardson, 11 Wend. R. 25.

² Willard v. Bridge, 4 Barb. 361, 367; 22 Barb. 314; 55 Barb. 188, 193; 5 Duer, 43, 46; 1 E. D. Smith, 54; ante, §§ 59-62, 106, 155-159, 399-402.

³ Foote v. Storrs, 2 Barb. 326; 6 Lansing, 319; 63 Barb. 349; 49 N. Y. 249; ante, § 611. See Fairfax v. N. Y. C. & H. R. R. Co., 67 N. Y. 11.

⁴ Cochran v. Dinsmore, 49 N. Y. 249; Lamb v. Camden & Amboy R. R. Co., 46 N. Y. 271; Harris v. Packwood, 3 Taunt. 264; Marsh v. Horne, 5 Barn. & Cress. 322; Memphis & C. R. R. Co. v. Reeves, 10 Wall. 126.

⁵ Union Ex. Co. v. Graham, 26 Ohio St. 595; Simmons v. Law, 3 Keyes, 217; French v. Buffalo, N. Y. & Erie R. R. Co., 4 Keyes, 108, 115; 30 N. Y. 630, 564; Whitworth v. Erie Ry. Co., 87 N. Y. 413, 419; Witting v. St. Louis & San Francisco R. R. Co., 28 Mo. App. 103; Little Rock, etc., Ry. Co. v. Harper, 44 Ark. 208.

⁶ 1 Greenleaf's Ev. §§ 74-81; 2 id. § 213; The Falcon, 3 Blatchf. 64; Roberts v. Chittenden, 88 N. Y. 33, 35.

from the fact of non-delivery;¹ and a like presumption arises from the carrier's delivery of goods in a damaged condition, it being first proved that he received them in good order;² the same presumption arises against the carrier where he fails to deliver the quantity received by him.³ The presumption is not so strong where a carrier delivers a perishable article in an impaired or damaged condition; and so he may overcome it by showing that it was properly stowed and transported.⁴

When goods are carried over successive lines of connecting railroads, and are delivered in a damaged condition, the owner establishes *prima facie* a right to recover against the last carrier, by showing that the goods were delivered in a good condition to the first carrier, and delivered by the last in an injured or damaged state.⁵ The presumption is based in part upon the policy of the law, considering how difficult it is for the owner to follow the goods along the extended line of transportation and show by whose negligence the injury was caused; and in part upon this general rule, that things once proved to have existed in a particular state are to be presumed to continue in that state, until the contrary is established by evidence, either direct or presumptive.⁶

So the owner suing the first of several connecting lines establishes a *prima facie* right to recover, by showing the non-arrival of the goods at the place of destination: this proof being sufficient to cast upon the carrier the burden of showing what became of the goods.⁷

¹ Burnell v. N. Y. Central R. R. Co., 45 N. Y. 184, 189; Canfield v. Baltimore & Ohio R. R. Co., 93 N. Y. 532; Wheeler v. Ocean Steamship Nav. Co., 125 N. Y. 155, 162. The delivery to the carrier must be first clearly proved. Woodbury v. Feink, 14 Ill. 279; McQuesten v. Sanford, 40 Maine, 117; ante, § 611.

² Ellis v. Willard, 9 N. Y. 529; Hastings v. Pepper, 11 Pick. 43, 106; Rich v. Lambert, 12 How. U. S. 357; Clark v. Barnwell, 12 How. U. S. 280; Koenigsheim v. Ham-burgh Am. Packet Co., 12 Daly, 123.

³ Hawkes v. Smith, 1 Carr. & M. 72; 9 N. Y. 529. The principle upon which the rule is founded embraces the case of a partial as well as a total failure to deliver the subject of the bailment. Canfield v. Baltimore & Ohio R. R. Co., 93 N. Y. 532, 538.

⁴ Lambert v. Benner, 1 Sweeney, 665; Nelson v. Woodruff, 1 Black, 156; 12 How. U. S. 272, 283.

⁵ Smith v. N. Y. Central R. R. Co., 43 Barb. 225; affirmed in Court of Appeals, 41 N. Y. 620; Wing v. N. Y. & Erie R. R. Co., 1 Hilton, 235; Laughlin v. Chicago, etc., 28 Wis. 204.

⁶ Best on Presumptions, § 136; 4 Denio, 431; 9 Barb. 271; 22 Barb. 516; 58 N. Y. 475. See 37 N. Y. 162. It is presumed that the last of a line of carriers received goods in the same condition in which they were delivered to the first in the line. Shriver v. Sioux City, etc., R. R. Co., 24 Minn. 506.

⁷ Brintnall v. Saratoga R., 32 Vt. 665; Monell v. Northern Cent. R. R. Co., 67 Barb. 581. See Laws of 1892, Chap. 676, § 48.

What proof is sufficient to establish a *prima facie* case against a carrier, intermediate the first and last? Proof of delivery to the first, being sufficient *prima facie* to charge him with having received the goods, additional proof that he did not transfer the goods to the succeeding carrier must be sufficient to cast upon him the *onus* of accounting for them.¹ Having been once charged with the custody of the goods as a carrier, he remains presumptively liable for them until he passes them over to the next carrier or to the owner.²

§ 672. When a carrier makes a special contract, exempting himself from certain specific dangers or risks, and fails to deliver the goods, it rests with him to show that the loss arose from the specified dangers or risks. He must bring himself within the exception.³ If he engages to carry and deliver goods safely, unless prevented by the perils of the sea, the lake or river, and does not deliver the goods, it is incumbent upon him to show that he was prevented from delivering them by such perils; ⁴ proof of non-delivery, or of loss or damage unexplained by the circumstances, being sufficient to throw upon the carrier the burden of accounting for the goods.⁵

The law will not presume a party guilty of culpable neglect of a legal duty.⁶ Hence the plaintiff, alleging a loss of his goods by the defendant's negligence, must as a general rule prove his allegation; he must support his complaint by evidence sufficient to uphold a verdict against the defendant. The defendant must then show a loss within the exceptions contained in the contract; and the plaintiff may then take up the case and show that the defendant's negligence under the circumstances actually caused or permitted the loss. This apparent shifting of the burden of proof occurs daily in the trial of this class of causes.⁷

¹ See *Mills v. Michigan Central R. Co.*, 45 N. Y. 622; *McDonald v. Western R. Cor.*, 34 N. Y. 497; 43 Barb. 225. In *Lee v. Bernheimer*, 6 J. & S. 40, it is held that no presumption of the arrival of goods arises from their shipment.

² *Gould v. Chapin*, 20 N. Y. 259.

³ *Woodworth v. McBride*, 3 Wend. 227; 4 B. & C. 446; 4 Campb. 20; *Ayman v. Astor*, 6 Cowen, 206; ante, § 587, and note.

⁴ *Transportation Co. v. Downer*, 11 Wallace, 129; *Clark v. Barnwell*, 12 How. U. S. 272; ante, §§ 585-587, and note to § 587.

⁵ *Riley v. Horne*, 5 Bing. 217; *Home Ins. Co. v. Western Transp. Co.*, 51 N. Y. 93; *King v. Shepard*, 3 Story C. C. R. 349; *Canfield v. Baltimore & Ohio R. R. Co.*, 93 N. Y. 532; *Wheeler v. Ocean Steamship Nav. Co.*, 125 N. Y. 155, 162; *Stewart v. Stone*, 127 N. Y. 500, 506.

⁶ *Hartwell v. Root*, 19 John. R. 345; *Munn v. Baker*, 2 Stark. R. 255.

⁷ *Westcott v. Fargo*, 6 Lans. 319; *The J. Russell M. Co. v. N. H. S. Co.*, 51 N. Y. 21; *Graham v. Davis*, 4 Ohio St. 362; *Cleveland R. R. v. Curran*, 19 Ohio St. 1, 221; *Knowlton v. Erie R. R.*, 19 Ohio St. 260; *Steinweg v. Erie Railway*, 43 N. Y. 123;

The fact of negligence is ordinarily to be found by the jury, from the evidence and the attending circumstances. It is for the jury to pass upon conflicting evidence, and find the fact from the testimony before them;¹ as they may in many cases from the nature of the accident, or from the conduct and relation of the parties, when the loss occurred.² "If a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of proper care."³

§ 673. *Damages.* The amount of damages to be recovered in an action against the carrier depends upon the extent of his liability and the nature of the loss or injury sustained.⁴ On a total loss, where there is no special contract limiting his liability, the value of the goods at the place of destination, deducting freight, is the measure of damages; and, if the goods be not totally lost, the owner recovers damages equivalent to the injury sustained.⁵ In an action on a bill of lading, for not delivering goods, stated to have been lost or embezzled during the voyage, without fraud on the part of the defendant, it was held that the master must answer for the value of the goods missing, according to the clear net value of goods of like kind and quality at the port of delivery;⁶ and he may also be held to pay interest on the value of the

Condict v. Grand Trunk R. Co., 54 N. Y. 500, 505, citing *Lamb v. Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271, which turned on the question as to the burden of evidence to show the fact of a negligent loss by fire. See *Rawson v. Holland*, 59 N. Y. 611; *Steers v. Liverpool, N. Y. & Phila. S. Co.*, 57 N. Y. 1; 56 N. Y. 194; 54 N. Y. 197; 45 N. Y. 514; 12 How. U. S. 272; *Home Ins. Co. v. Western Transp. Co.*, 51 N. Y. 93, 96; 51 N. Y. 369, 497; 50 N. Y. 661; *Viner v. N. Y., etc., Steamship Co.*, 50 N. Y. 23, 53; 49 N. Y. 442; *Cochran v. Dinsmore*, 49 N. Y. 249; *Zinn v. New Jersey S. Co.*, 49 N. Y. 442; 48 N. Y. 209; 47 N. Y. 282, 525; 45 N. Y. 184, 514; 44 N. Y. 94; 44 N. Y. 263; *Guillaume v. Hamburgh & Am. Packet Co.*, 42 N. Y. 212; *Heilman v. Lazarus*, 90 N. Y. 672; *Heinemann v. Heard*, 62 N. Y. 455; *Stewart v. Stone*, 127 N. Y. 500; *Blunt v. Barrett*, 124 N. Y. 117.

¹ *Ireland v. O., H. & S. Plank Road Co.*, 13 N. Y. 526, 533; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9.

² *The J. Russell M. Co. v. N. H. S. Co.*, 50 N. Y. 121; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534, 544.

³ *Scott v. London, etc., Dock Co.*, 3 Hurlst. & Colt. 596; 13 Peters, 181; *Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. 236; *Breen v. N. Y. C. & H. R. R. R. Co.*, 109 N. Y. 297.

⁴ *Jeremy on Carriers*, 132; *Ludwig v. Meyre*, 5 Watts & Serg. 435; *Hand v. Baynes*, 4 Whart. 204.

⁵ *Brackett v. McNair*, 14 John. R. 170; *Wallace v. Vigus*, 4 Blackf. (Ind.) 260; *McGregor v. Kilgore*, 6 Ohio R. 143; ante, § 610.

⁶ *Watkinson v. Laughton*, 8 John. R. 213; *Sturgess v. Bissell*, 46 N. Y. 462.

goods from the time he ought to have delivered them; interest being the reasonable measure of damages for the detention of the ascertained amount, to be allowed or not, according to the earlier decisions, in the discretion of the jury.¹ Upon principle, the owner is now considered entitled to interest on the damages from the time he sustained the injury.² The damages recoverable against a carrier are such as result naturally from his failure to fulfill his contract. If the property be wholly lost in the transit, by such failure, the owner is entitled to recover its value at the place of destination named in the contract; and the carrier is entitled to have the freight deducted from the value, not because he has earned it, but on the ground that the stipulated freight represents the cost of placing the goods in that market; so that the value of the property in that market, deducting the freight, will exactly indemnify the owner³—the value to be ascertained according to the market rates, giving to the owner what he might have received for the property on a sale or other disposition of it.⁴

The same rule applies where a railroad contracts to carry and deliver goods to a point beyond the termination of its line. There being no such contract, the damages are to be assessed at the market price at the terminus of the road.⁵

§ 674. When the carrier without any legal excuse delivers the goods in a damaged condition, the owner recovers as damages the difference between the value of the goods delivered in proper order or in the condition in which the carrier received and undertook to deliver them, and their value in their damaged condition as delivered.⁶ The owner loses

¹ *Richmond v. Bronson*, 5 Denio, 55; 45 Barb. 40.

² *Sherman v. Wells*, 28 Barb. 403; *Sedgwick on Damages*, 421, 6th ed. See *Lakeman v. Grinnell*, 5 Bosw. 625, where the loss occurred before the vessel sailed; *Krohn v. Oechs*, 48 Barb. 127.

³ *Sturgess v. Bissell*, 46 N. Y. 462; *Spring v. Haskell*, 4 Allen, 112; *Laurent v. Vaughan*, 30 Vt. 90; 37 Barb. 122; *Rice v. Ontario Steamboat Co.*, 56 Barb. 584; *Bridgman v. Steamboat Emily*, 18 Iowa, 509. See *The Nith*, 36 Fed. Rep. 86; *Mobile, etc., R. R. Co. v. Jurey*, 111 U. S. 584.

⁴ *Smith v. Griffiths*, 3 Hill, 333; *Cushing v. Wells, Fargo & Co.*, 98 Mass. 550.

⁵ *Perkins v. Portland, S. & P. R. R. Co.*, 47 Maine, 573; *Marshall v. N. Y. Central R. Co.*, 45 Barb. 502. The value at the place of loss has been allowed. *Harris v. Panama R. Co.*, 3 Bosw. 7; *S. C.* 5 Bosw. 312; 3 Story, 349.

⁶ *Henderson v. Ship Maid of Orleans*, 12 La. Ann. 352; *Black v. Camden & Amboy R. & Transp. Co.*, 45 Barb. 40; *Heil v. St. Louis, etc., Ry. Co.*, 16 Mo. App. 363; *Estill v. N. Y., L. E. & W. R. R. Co.*, 41 Fed. Rep. 849. The fact that the owner of the goods has paid the freight or has submitted to a judgment therefor will not preclude him from recovering damages for injuries to the goods while *en route*. He may pay the freight and sue for damages, or set up his damages by way of counterclaim in an action to recover the freight, or he may bring a cross action. *Schwinger v. Raymond*, 83 N. Y. 192.

by the injury to the goods, the difference between what they are worth as delivered, and what they would have been worth, delivered in a good condition. And in estimating or measuring the damages, the rule is to ascertain the value of the goods in the condition in which they were delivered to the carrier, and the value of them in their damaged condition when received by the consignee; the difference between these amounts is the true measure of damages.¹ The owner recovers that sum, which, added to the value of the injured article, is equal to that article in a sound condition.

§ 675. An element of policy appears in the earlier decisions, requiring the carrier to make good the loss of missing goods, or any damage accruing to the goods delivered while in his hands. The rule as applied to the ship-carrier is deemed salutary, because in furtherance of the general policy of the marine law, which holds the master responsible as a common carrier for accidents, and all causes of loss, not coming within the exception in the bill of lading; and because it takes away all temptation to withhold a delivery of the goods, and exempts the shipper from the hard task of undertaking to detect, in every case, the negligence, fault or fraud of the carrier; and it must be admitted that the rule is highly just and necessary when a loss is imputable to either of these causes.²

It is of course wise to adopt a rule of damages with some view to its effect upon the conduct of the parties; and we find that this is actually done, with reference to different classes of contracts; instance, contracts for personal services, and charter-parties where the charterer fails to lade a vessel pursuant to the contract.³ The law for wise reasons also imposes upon the party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and when the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him.⁴

§ 676. On a breach of an executory contract to carry and deliver a cargo of grain, the hirer is entitled to recover as his damages the differ-

¹ *McHenry v. Railroad Co.*, 4 Haring R. 448.

² *Gillingham v. Dempsey*, 12 Serg. & Rawle, 188; *Brandt v. Bowlby*, 2 Barn. & Adolph. 932; *Warden v. Greer*, 6 Watts, 424; *O'Conner v. Foster*, 10 Watts, 418.

³ *Heckscher v. McCree*, 24 Wend. 304; *Shannon v. Comstock*, 21 Wend. 457; *Ashburner v. Balchen*, 7 N. Y. 262.

⁴ *Hamilton v. McPherson*, 28 N. Y. 72; *Clark v. Marsiglia*, 1 Denio, 317; *Spencer v. Halstead*, 1 Denio, 606; *Loker v. Dorman*, 17 Pick. 284; *Miller v. Mariners' Church*, 7 Greenleaf, 51.

ence between the contract price and the market rate of freight, ruling at the time the ship should have sailed.¹ Being able to find another conveyance, the owner's legal damages are limited to the increased expense of sending forward his goods.² Being unable to find another conveyance, the hirer is entitled to recover the difference between the value of his goods at the port of shipment and their value at the port of destination, deducting freight;³ or the additional cost of the transportation, where he is able to send the goods by an unusual and more expensive conveyance.⁴

When the goods are lost by accident at or near the port of lading, without any actual negligence on the part of the carrier, the owner recovers the value of the goods at that port; on the ground, that this value will ordinarily indemnify him against loss, enabling him to replace the goods and send them forward by another vessel.⁵ The carrier's negligence, or fraud, or fair dealing, bears on the measure of damages; and yet the test question appears to be this, whether the market price at home or the price at the port of destination will under the circumstances furnish a true and perfect indemnity.⁶

§ 677. When the owner brings an action of trover against a common carrier, he recovers the value of the property with interest thereon from the time of the conversion, or from a reasonable time thereafter. This appears to be the general rule, where no circumstances of bad faith or willful misconduct accompany the act;⁷ and the rule is the more reasonable because an act of conversion does not affect the title to the property.⁸

We have seen that the carrier is also liable for the damages caused by his delay in transporting and delivering the goods pursuant to his contract; and that the general rule is to allow the owner to recover such damages as will indemnify him against the direct and natural consequences of the carrier's inexcusable delay.⁹

¹ *Ogden v. Marshall*, 8 N. Y. 340.

² *Grund v. Pendergast*, 58 Barb. 216.

³ *Brackett v. McNair*, 14 John. R. 170; 15 John. R. 24; 3 Caines' R. 219; 8 John. R. 213; 6 Cowen, 263; *O'Conner v. Foster*, 10 Watts, 418; *McGovern v. Lewis*, 50 Penn. St. 231; *Fox v. Hayward*, 4 Brewster, 32.

⁴ *Cooper v. Young*, 22 Geo. 269.

⁵ *Wheelwright v. Beers*, 2 Hall, S. C. R. 391; *Lakeman v. Grinnell*, 5 Bosw. 625; *Dresar v. Murgatoyd*, 1 Wash. C. R. R. 13; *Bridge v. Austin*, 4 Mass. 115.

⁶ *Lakeman v. Grinnell*, *supra*, and cases there cited.

⁷ *Ante*, §§ 112, 270, 406, 407; *Whelan v. Lynch*, 60 N. Y. 469; *Andrews v. Durant*, 18 N. Y. 496.

⁸ *Ball v. Liney*, 48 N. Y. 6.

⁹ *Ante*, §§ 608-611; *Wilson v. Lancashire & Yorkshire R. Co.*, 9 Com. B. (N. S.) 632; *Collard v. South Eastern R. Co.*, 7 H. & N. 79.

XI. CARRIAGE OF LIVE STOCK.

§ 678. Since the introduction of railways, the transportation of horses, cattle and other live stock has grown up into an important branch of business. The English railways were not at first obliged to assume the character and liabilities of common carriers; and independent of any statute they can hardly be charged with the common law liability of common carriers of live stock, where they have not assumed the character by their mode of transacting the business.¹ Assuming to carry all kinds of freight, including live stock, indiscriminately for all persons, they are thus chargeable; with certain qualifications arising out of the peculiar nature of the property.² Having the right to assume the character or not, at pleasure, it is under the common law within their power to limit their business to the transportation of a specific kind of goods, or so as to exclude a specific kind.³

The statute of England, already noticed, makes it the duty of railway and canal companies to afford all reasonable facilities for receiving, forwarding and delivering traffic upon their several lines of transportation, including goods, animals and other articles.⁴ It also renders the company liable for the loss of, or for any injury done to, any horses, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants; permitting the company to prescribe just and reasonable terms or conditions; and fixing the damages to be paid at so much per head, on a loss of such animals, unless valued on delivery to the company at a higher sum; and further providing that special contracts for such transportation must be made in writing.

In this State railroad corporations are, by an act of the Legislature, made common carriers, with such variations as the nature of the business requires. They are required to receive and carry all kinds of property; receiving and discharging the same, at fixed times and places, duly advertised beforehand.⁵ Being thus made common carriers, railroads have no right to prescribe the conditions on which alone they will receive goods for transportation; but where they actually receive them

¹ *McManus v. Lancashire & Yorkshire R. Co.*, 2 H. & N. 693; 4 Jur. N. S. 144; 27 L. J. Exch. 201; 4 H. & N. 346; *Kimball v. Rutland Co.*, 26 Vt. 247; *Michigan S. R. Co. v. McDonough*, 21 Mich. 189.

² *Parker v. Great Western R.*, 7 Man. & G. 253; *Muschamp v. Lancaster R.*, 8 Mees. & Welsb. 421; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749; 12 M. & W. 766; *Weed v. S. & S. R. Co.*, 19 Wend. 534; ante, § 515; *Penn. v. Buffalo & Erie R. R.*, 49 N. Y. 204.

³ *Sewell v. Allen*, 6 Wend. 335; *Blanchard v. Isaacs*, 3 Barb. 388.

⁴ *Railway and Canal Traffic Act 1854*, 17 and 18 Vict. c. 31, § 2.

⁵ *Laws of 1892*, Chap. 676, § 34.

under a special agreement for carriage, their liabilities will, with few exceptions, be regulated by the terms used.

§ 679. Excluding causes of loss or injury arising from the proper vice or peculiarities of live stock, we find railways and transportation companies treated as common carriers of this species of property, and held liable as such for injury or loss arising from other causes not coming within the exceptions to the general rule. Receiving live stock to carry under the contract implied by law, or without any special stipulations, they are common carriers, with such qualifications of their liability as the law itself supplies.¹ They are bound to take suitable care of the property, considering its nature, on the way and at the place of destination.² They are bound to furnish secure and safe and proper cars or conveyances, and run them with diligence and regularity, halting at convenient times and places, so as to permit the cattle to be properly watered and fed and cared for.³ The duty of a railway company to furnish sound and sufficient cars, properly constructed, is strictly enforced; the company cannot escape this obligation by calling attention to the defective condition of the cars, at the time the cattle are received on board; they can only escape liability for losses arising therefrom by proof of a distinct agreement by the owner to assume the risk arising from that cause.⁴ And it has been held that they cannot make a valid contract, exempting themselves from liability for damages resulting from defective and unsafe cars supplied by them.⁵

§ 680. There is some tendency in the decisions to relieve our railroad

¹ *Palmer v. Grand Junction Co.*, 4 M. & W. 758; *Kimball v. Rutland Co.*, 26 Vt. 247; *Merritt v. Earle*, 29 N. Y. 115; assumed in *Railroad Co. v. Pratt*, 22 Wall. 123; *Wyld v. Pickford*, 8 M. & W. 443; *Kansas Pacific R. Co. v. Nichols*, 9 Kansas, 235; *Louisville & N. R. R. Co. v. Wynn*, 88 Tenn. 320; *Missouri Pacific R. R. Co. v. Cornwall*, 70 Texas, 611; *Gulf, C. & S. F. R. R. Co. v. Ellison*, 70 Texas, 491; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *Bamberg v. South Car. R. R. Co.*, 9 S. C. 61; *McCoy v. K. D. & M. R. R. Co.*, 44 Iowa, 424.

² *Great Northern R. Co. v. Swaffield*, 8 English (Moak), 567, citing *Notara v. Henderson*, 1 English (Moak), 269.

³ *Squire v. N. Y. Central R.*, 98 Mass. 239; *Ill. Central R. R. Co. v. Adams*, 42 Ill. 474; *Gregory v. West. M. R. Co.*, 2 H. & C. 944; *Wabash, St. Louis, etc., R. R. Co. v. Pratt*, 15 Ill. App. 177. See U. S. Rev. St. § 4386, in respect to keeping cattle upon cars for more than twenty-eight consecutive hours without unloading; and *Missouri P. R. R. Co. v. Ivy*, 79 Texas, 444. See also, *Bills v. N. Y. C. R. R. Co.*, 84 N. Y. 5; and see N. Y. Penal Code, § 663.

⁴ *Pratt v. Ogdensburgh & Lake Champlain R. Co.*, 102 Mass. 557; *Railroad Co. v. Pratt*, 22 Wall. 123; 14 N. Y. 570; 111 Mass. 142; *Harris v. Northern Ind. R. Co.*, 20 N. Y. 232; *Combe v. London & Southwestern R. Co.*, 31 L. T. N. S. 613; *St. Louis & S. R. Co. v. Dorman*, 72 Ill. 504.

⁵ *Welsh v. Pittsburgh, Ft. W. & C. R. R. Co.*, 10 Ohio St. 65.

companies of their liability as common carriers, in the transportation of live stock.¹ And it is quite clear that the law does not hold them liable for the safe transportation of horses and cattle under the same strict rule which applies to goods and merchandise, inanimate property. The business is of recent origin; and the carrier has not the same control over animals as he may have over inanimate matter.² He can store away *goods* so as to secure their safety. But a carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured, or they may kill each other by crowding, plunging or goring; the motion of the cars, their frequent concussions, the scream of the engine, often create a kind of frenzy in the swaying mass of cattle; and the carrier is not held liable for injuries or losses arising from the irrepressible instincts of this living freight, which he could not prevent by the exercise of diligence and care.³ Using all due and reasonable care, he is not liable for the loss of an animal that escapes by its own efforts from the cattle-car and is killed;⁴ or for the loss of an animal killed on a vessel in a storm at sea, by straining, caused by the roll or motion of the ship;⁵ or for an injury inflicted by one horse upon its mate, in transit on a railway, where the injury results from the peculiar character and propensities of the horse, such as fright or bad temper; or for injuries resulting from the owner's fault in fastening the animal, or in omitting to remove his shoes;⁶ or for any injury resulting from the proper vice of the animal.⁷ If the animal, a horse for

¹ Michigan So. & Northern Ind. R. Co. v. McDonough, 21 Mich. 165; Lake Shore & M. So. R. Co. v. Perkins, 25 Mich. 329; S. C. 12 Amer. R. 275; McManus v. Lancashire R. Co., 2 Hurl. & Norman, 702; S. C. 4 Hurl. & Norman, 346; Carr v. Lancashire & Y. R. Co., 7 Exch. 712, 713.

² See Boyce v. Anderson, 2 Peters, 150, where a like exception was made in favor of a carrier of slaves that leaped from a steamboat in a panic.

³ Clarke v. Rochester & Syracuse R. Co., 14 N. Y. 570; 21 Mich. 165, 189; Louisville, N. O. & T. R. R. Co. v. Bigger, 66 Miss. 319; Black v. Chicago, B. & Q. R. R. Co., 1 Neb. L. J. 30; Boehl v. Chicago, M. & St. P. R. R. Co., 44 Minn. 191; Penn v. Buffalo & Erie R. R. Co., 49 N. Y. 204; Mynard v. Syracuse, etc., R. R. Co., 71 N. Y. 180; Holsapple v. R., W. & O. R. R. Co., 86 N. Y. 275.

⁴ Great Western R. Co. v. Blower, 2 English (Moak), 700.

⁵ Nugent v. Smith, 1 L. R. C. P. Div. 423; 45 L. J. C. P. Div. 697; 34 L. T. N. S. 827; 25 W. R. 117 C. A. Case of a horse carried by the sea from London to Aberdeen, and killed by fright and consequent struggling.

⁶ Evans v. Fitchburg R. Co., 111 Mass. 142; Richardson v. N. E. R. R., 7 C. P. 75; 14 N. Y. 570.

⁷ Smith v. New Haven R. Co., 12 Allen (Mass.), 531.

example, be placed in a car and secured in the usual manner, and found injured at the place of destination, the carrier is not liable unless it be found from the nature of the injury, or from some accident on the journey, or from some defect in the conveyance, that the damage resulted from his negligence.¹

§ 681. The carrier of live stock must exercise reasonable diligence in the business, and he must complete the journey within a reasonable time.² He is liable as a common carrier for the construction and equipment of his road, for the running of his trains, and generally, except so far as his responsibility is modified by contract or by the inherent vice of the freight itself.³

There is some imperfection in this mode of stating the liability of a carrier of live stock; since it calls for a careful definition of his duty to guard against losses likely to arise from the nature of different animals, confined in trucks, cars or vessels, on the route of transportation: a duty which requires him to use foresight, vigilance and care to prevent injuries from the nature or conduct of the animals, such careful precautions and diligence as may be reasonably expected from a man engaged in the business.⁴ He is not an insurer against injuries arising from the nature and propensities of the live stock carried by him; and his liability is not limited to a careful and safe conveyance of the car containing them. He must provide in advance suitable and proper means to insure the safe conveyance of the property; and he must use these means with all reasonable diligence and forethought, in the varying circumstances and exigencies arising in the business.⁵

¹ *Kendall v. London & Southwestern R. Co.*, 2 English (Moak), 700; *Clarke v. Rochester & Syracuse R. Co.*, 14 N. Y. 570. The circumstances of these cases are very much alike; the causes of the injury being a matter of inference from the nature of the injury and the apparent manner of it.

² *Harris v. Northern Ind. R. Co.*, 20 N. Y. 232; *Conger v. Hudson River R. R. Co.*, 6 Duer, 375; *German v. Chicago & N. R. Co.*, 38 Iowa, 137.

³ *Wilson v. Hamilton*, 4 Ohio St. 722; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Kansas Pacific R. Co. v. Nichols*, 12 Amer. R. 491, note 500; S. C. 9 Kansas, 235; *Kimball v. Rutland R. Co.*, 26 Vt. 427; 14 N. Y. 570; 20 N. Y. 232; 10 Ohio St. 65.

⁴ *Clarke v. Rochester & Syracuse R. Co.*, 14 N. Y. 570; *Nugent v. Smith*, *supra*.

⁵ Besides providing safe and properly constructed vehicles or conveyances, a railway carrier of live stock must provide convenient stations or stopping places along the road, where the cattle may be fed; and it must provide a proper supply of water for the use of the stock; and in carrying live hogs in warm weather, it is the carrier's duty to provide and to apply water to them, to prevent them from being suffocated or overheated. It is also bound to start its trains loaded with cattle promptly; and, unless prevented by some excusing cause, it is bound to arrive on time, or pay the damages caused by its delay. *Toledo, Wabash & W. R. Co. v. Thompson*, 71 Ill. 434;

§ 682. Under the English decisions prior to the statute of 1854, the carriage of live stock by the railways was regulated by contract; the companies receiving these chattels under a special agreement, by the terms of which the owners or their servants accompanied the trains, taking care of and feeding the cattle during the journey. And in some instances the charge for freight was made expressly for the use of the railway carriages and locomotive power only, with an express stipulation that the company would not be responsible for any alleged defects in the carriages used, unless complaint was made at the time of booking; nor for any damages, however caused, in the journey of transportation.

The railway companies were not at first declared common carriers; and they were regarded or treated as common carriers only so far as they voluntarily became such. Refusing to accept the character in the transportation of live stock, they were held liable as bailees, under and according to the terms of the contract, in each case. In this manner they were able to escape all liability in the conveyance of live stock, not involving willful misconduct or misfeasance on their part.¹

Since the passage of the act of 1854 the English railways are only allowed to impose reasonable conditions. They cannot relieve them-

Toledo, Wabash & W. R. Co. v. Hamilton, 77 Ill. 393; St. Louis & S. R. Co. v. Dorman, 72 Ill. 504; Ill. Central R. Co. v. Waters, 41 Ill. 73; Ill. Central Co. v. Owens, 53 Ill. 391; Cragin v. N. Y. Cent. R. Co., 51 N. Y. 61; 49 N. Y. 204, 263; Harris v. Northern Ind. R. Co., 20 N. Y. 232; Nugent v. Smith, cited above, under § 680; Gulf, C. & S. F. R. R. Co. v. McCorquodale, 71 Texas, 41; Gulf, C. & S. F. R. R. Co. v. Ellison, 70 Texas, 491.

¹ Decision prior to 17 and 18 Vict. c. 31. The contract prior to the statute created a special relation, and was allowed to relieve the carrier according to its terms, even from an injury caused by a collision; Great Northern R. Co. v. Morville, 7 Eng. Railw. Cas. 830; 10 Eng. Law & Eq. 366; and from all risks of the conveyance whatsoever; Shaw v. York & North M. R. Co., 6 Eng. Railw. Cas. 87; 13 Q. B. 347. The owner of the animals was obliged to bring his action upon the actual contract, and could only recover on showing a breach thereof. Austin v. Manchester, S. & L. R. Co., 16 Q. B. 600; 15 Jur. 670; 5 Eng. Law & Eq. 329; Carr v. Lancashire & Y. R. Co., 7 Exch. 707; 7 Eng. Railw. Cas. 426; 17 Jur. 397; 14 Eng. L. & Eq. 340; Chippendale v. L. & Y. R. Co., 17 Eng. L. & Eq. 399. A railway company letting trucks for hire for the conveyance of horses, delivered to the owner of the horses a ticket in which it was stated that the owners were to undertake all risks of injury by conveyance and other contingencies, and further stipulated that the company would not be liable for any damages, however caused, to horses or cattle; held that the owner of the horses could not recover for damage done to them through the breaking of an axle, attributable to the culpable negligence of the company's servants. Austin v. Manchester, Sheffield & L. R. Co., 10 C. B. 454; Railw. Cas. 300, A. D. 1850. The contract was enforced as made. Walker v. York & North M. R. Co., 2 El. & Bl. 750, A. D. 1853. Same principle affirmed in Canada. Dodson v. Grand Trunk R. Co., 7 Canada, L. J. N. S. 263.

selves from all liability for injuries in the transit;¹ and it is adjudged that a condition whereby a railway company disavows liability for any injury to cattle carried by them, in consequence of over-carriage, detention or delay, is unreasonable, though the charge for transportation be reduced below the usual rate.² The common law does not allow a party to shield himself by a dishonest contract; and this statute does not permit a railway company to protect itself by an *unreasonable stipulation*; and it restricts even a reasonable stipulation to its fair scope and operation.³

§ 683. As we have no statute in this country limiting or qualifying the freedom of parties to make such contracts as they deem proper, our railroad companies are left free to make such contracts for the conveyance of live stock as the common law will enforce. They cannot, being common carriers, impose their own terms; and they cannot, according to a well defined line of authorities, stipulate for exemption from liability for the negligence of themselves or their servants—an inability which assumes that the principle of the English statute exists in the common law itself.⁴ With this qualification, or without it according to the English decisions followed by many of our States, our railroad carriers are at liberty to, and do practically carry on the business of conveying live stock under special agreements prescribing their liabilities; so that in some cases the contract covers the entire transaction, and furnishes the measure of the carrier's liability; and in some cases relieves him of certain specified risks, and leaves him liable under an implied contract for others.

We have then, first, a difference in principle to deal with; some of our States holding with the United States Supreme Court, that a com-

¹ Gregory v. West. M. R. Co., 2 H. & C. 944; Lloyd v. Waterford & L. R. Co., 15 Ir. C. L. R. 37; 9 L. T. N. S. 89 Q. B.

² Allday v. Great Western R. Co., 5 B. & S. 903.

³ A contract for the carriage of a cow contained this stipulation: "The Great Northern Railway Company gives notice that they convey horses, cattle, sheep, pigs, and other live stock in wagons subject to the following condition: that they will not be responsible for any loss or injury to any horse, cattle, sheep or other animal, in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging or restiveness of the animal;" and it was held that the stipulation did not relieve the company for the negligence of its servants in taking the animal out of the truck at the place of destination, where the creature was killed partly through its fright or restiveness. Gill v. Manchester, S. & L. R. Co., 42 L. J. Q. B. 89; 8 L. R. Q. B. 186.

⁴ Welch v. Boston & Albany R. R. Co., 41 Ct. 333; Welch v. Pittsburgh, Ft. W. & C. R. R. Co., 10 Ohio St. 65; Farnham v. Camden & Amboy R. R. Co., 15 Penn. St. 53; Colton v. Cleveland & Pitts. R. R. Co., 67 Penn. St. 211; Railroad v. Lockwood, 17 Wall. 367, and authorities there cited; Railroad Co. v. Pratt, 22 Wall. 123.

mon carrier cannot exempt itself from liability, by contract or otherwise, for losses or injuries caused by the negligence of its agents and servants;¹ and others holding with the English decisions, already cited, that the railway carrier may thus limit its liability by an express contract.² In the second place, we have two classes of contracts for the conveyance of live stock; one broad and general, covering the entire business, and the other limited to a few particulars.

§ 684. The contract now in use for the conveyance of live stock on many of our railroads is very comprehensive. It charges the shipper with the loading and unloading of the stock, at his own risk, and it imposes upon him in express terms all and every risk of injuries which the animals or any of them may receive in consequence of being wild, unruly, vicious or weak, or by escaping, maiming or killing themselves or each other, and all injuries from delays, or in consequence of heat, suffocation or the ill effects of being crowded in the cars upon the road, or from the burning of any hay or straw or other material used by the owner in feeding them, and all damages sustained by delay. The contract assumes that the owner or his servant shall accompany and water and feed and have charge of the cattle; and that he shall ride on the train, without paying fare, at his own risk. The railroad company in substance only undertakes to convey the car containing the cattle safely, and with reasonable dispatch; it lets the cars at a fixed sum, and agrees to run them to the place of destination; the owner retaining the custody and care of the cattle while in transit.³

¹ 41 Conn. 333; 10 Ohio St. 65; 55 Penn. St. 53; 22 Wall. 123. "I do hereby release the said railroad company from any and all claims which may or might arise for damages or injury to said stock, while in the cars of said company, or for delay in its carriage, or for escape thereof from the cars, and generally from all claims relating thereto." This release does not exonerate the company, under the law of Pennsylvania, from the consequences of negligence in the performance of their duty as carriers, such as permitting straw to be used in a car where a horse is placed, and which taking fire destroys the horse. *Powell v. Penn. R. Co.*, 32 Penn. St. 414.

² This is unquestionably the rule in this State. *Mynard v. Syracuse, B. & N. Y. R. R. Co.*, 71 N. Y. 180; *McKinney v. Jewett*, 24 Hun, 19; *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370; *Wilson v. N. Y. C. & H. R. R. Co.*, 27 Hun, 149; 97 N. Y. 87. But the cases all hold that the contract must expressly and unmistakably provide for such exemption.

³ *Penn. v. Buffalo & Erie R. Co.*, 3 Lansing, 443; S. C. 49 N. Y. 204. The report gives a copy of the

STOCK CONTRACT.

CLEVELAND STATION, Dec. 8, 1866.

Memorandum of an agreement made and concluded this day above named, by and between Cleveland, Painesville & Ashtabula, Erie & North East, Buffalo & State Line (afterward the Buffalo & Erie Railroad Company, the defendant) Railroad Companies, of the first part, by their agent at the above named station, and Penn. & Co., of Cincinnati, of the second part, witnesseth: That whereas, the said railroad com-

§ 685. It does not require a special contract to relieve the carrier from damages resulting from the vitality of the freight, without fault on his part. And although he is *prima facie* bound to furnish safe and suitable cars, it is agreed that the shipper may assume any risk of injuries likely to arise from the size or construction of the cars.¹ Is

panies transported live stock only at first-class rates, as per their tariffs, excepting only in cases where the owners assume certain risks and incidents specified below, in consideration of obtaining the transportation at reduced rates; and whereas the said party of the second part in the present case assumes and takes upon himself said risks and incidents for said consideration: Now, therefore, in consideration that said railroad companies will transport for the said party such live stock at the reduced rate of forty-five dollars for single decks, and —dollars for double decks per car-load from Cleveland to Buffalo, and charges advanced,

The said party of the second part does hereby agree to take, and hereby does assume all and every risk of injuries which the animals or either of them may receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming or killing themselves or each other, or from delays, or in consequence of heat, suffocation or the ill effects of being crowded upon the cars of said railroad, or on account of being injured by the burning of hay, straw or any other material used by the owner for feeding the stock or otherwise, and for any damage occasioned thereby, and also all risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to, or from or in the loading or unloading of said stock.

And it is further agreed that the said party of the second part is to load and unload said stock at his own risk, the said railroad companies furnishing the necessary laborers to assist, under the direction and control of the said party of the second part, who will examine for himself all the means used in the loading and unloading, to see that they are of sufficient strength and of the right kind, and in good repair and order.

And it is further agreed between the parties hereto, that each and every of the parties riding free to take care and charge of said stock, do so at their own risk of personal injury from whatever cause; and the said party of the second part, for the consideration aforesaid, hereby releases and agrees to release and to hold harmless and keep indemnified the said party of the first part of and from all damages, actions, claims and suits on account of any and every the injuries, loss and damage hereinbefore referred to, if any such occurs or happens.

And this agreement further witnesseth, that the said party of the second part has this day delivered to said companies five car-loads of cattle to be transported to Buffalo on the conditions, stipulations and understandings above expressed.

Names of men passed in charge of stock: D. W. BARROW.

A. HILL, *W. Station Agent.*

D. PENN, by D. W. BARROW.

See analogous contract for carrying coal; *Mallory v. Tioga Railroad Co.*, 39 Barb. 488; affirmed, 32 How. Pr. 616, n. Under the contract above set forth the carrier is not exempted from liability for a loss of the stock caused by the burning of the bedding in the stock-car through his own negligent act or omission, for the reason that the contract does not expressly exempt him from liability for negligence. *Holsapple v. R. & O. R. R. Co.*, 86 N. Y. 275. A contract for the transportation of property "at the owner's risk" does not free the carrier from liability for losses accruing through his gross negligence. *Canfield v. Baltimore & Ohio R. R. Co.*, 93 N. Y. 532.

¹ *Squire v. N. Y. C. R. Co.*, 98 Mass. 239. The action was for damages caused to some hogs that were smothered on the way from Suspension Bridge to Albany; and the court asserted the validity of a contract by which the person delivering the animals assumed the risk of injuries resulting from the size and mode of construction of the cars and the manner of stowing the property, where the owner assisted in loading the cars and accompanied them. The court cites *Kimbal v. Rutland & B. R. Co.*, 26 Vt. 247; and *Bissell v. N. Y. C. R. Co.*, 25 N. Y. 442, as involving the same question,

there then any principle of law to prevent the shipper from making a valid contract, hiring the use of specific cattle cars for a given trip, with the requisite locomotive power to move them, and assuming any and every risk of the conveyance?¹ The carrier may, under the English decisions and under the decisions of many of our States, exempt himself as common carrier for responsibility for any degree of negligence on the part of his servants, agents and employees,² including negligence of servants and employees in the selection of a car for the transportation of live stock;³ and if the shipper elects to have his property transported under a contract containing such stipulations he must necessarily assume, without express words, all of the excepted risks. He may therefore for a consideration expressly assume the risk of injuries to swine from heat, suffocation or the ill effects from being crowded together in the car; and the courts will give effect to the stipulation, even where the injury might have been prevented by a reasonable watering or cooling of the hogs with water.⁴ Retaining the care and custody of the stock, it is the shipper's duty under the contract to guard against all risks of this kind.

Assuming that the carrier cannot relieve himself by stipulation from the duty to fulfill his contract with fidelity and reasonable diligence; it is nevertheless quite apparent that a railroad company, by reason of its contract, occupies the position of a private carrier for hire; and that the agreement prescribes the extent of its liability, unless a loss arises from some wrongful act, either willful or negligent, on the part of the carrier, its agents or servants.⁵

We have already referred to the analogous contract under which a steamboat or steam-tug takes a barge or vessel in tow, without otherwise assuming the custody or control of her, on a stipulation limiting

namely, the validity of the contract; and two English cases holding like stipulations valid and reasonable; *i.e.*, *Pardington v. South Wales R. Co.*, 1 H. & N. 392; and *Beal v. South Devon R. Co.*, 5 H. & N. 875; 3 H. & N. 337.

¹ *Shaw v. York & N. Midland R. Co.*, 6 Eng. Rail. Cas. 87; *Austin v. Manchester & Sheffield R. Co.*, 5 Eng. Law & Eq. 329.

² *French v. Buffalo, N. Y. & Erie R. Co.*, 4 Keyes, 108; *Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442; *Smith v. N. H. & N. R. Co.*, 12 Allen, 531; *Keeny v. Grand Trunk R. R. Co.*, 59 Barb. 104; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *Nicholas v. N. Y. C. & H. R. R. R. Co.*, 89 N. Y. 370; *McKinney v. Jewett*, 24 Hun, 19; *Kenney v. N. Y. C. & H. R. R. R. Co.*, 125 N. Y. 422.

³ *Wilson v. N. Y. C. & H. R. R. R. Co.*, 27 Hun, 149; 97 N. Y. 87.

⁴ *Cragin v. N. Y. C. & H. R. R. R. Co.*, 51 N. Y. 61.

⁵ *Penn v. Buffalo & Erie R. R. Co.*, 49 N. Y. 204, 208; *French v. Buffalo, N. Y. & Erie R. R. Co.*, 4 Keyes, 108; *Farnham v. Camden & Amboy R. R. Co.*, 55 Penn. St. 53; *Colton v. Cleveland & Pittsburgh R. Co.*, 67 Penn. St. 211; *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. U. S. 644.

the liability of the proprietors of the towing boat within a very narrow range.¹ The owners of the steam-tug or steamboat engaged in the business of towing barges and canal-boats are not regarded as common carriers. They do not receive the property into their custody; they do not exercise any control over it other than such as results from the towing of the boats in which it is laden; the master and crew of the boats in tow retain the care and charge of the goods on board, subject only to the general authority of the master of the steamboat guiding the flotilla. There is here no sufficient delivery to constitute a bailment; certainly none sufficient to charge the owners of the tug as common carriers.² They may therefore limit their liability to an honest and fair fulfillment of the contract, according to its true sense and meaning. And the contract is to be enforced on the same principles which apply to any other special agreement.³ Under a general exemption, they are liable for injuries arising from their own personal negligence, from the want of good faith, or from the gross negligence of their agents and servants.⁴ The same principle applies to the special contract of a common carrier, where the same is broad and general in its terms.⁵

§ 686. Under a special contract by a common carrier, the relations of the parties are changed; and it depends upon the form and scope of the contract whether it is to be considered as creating an exemption from certain losses and leaving the carrier liable as upon the common law for all others, or as a contract creating a special bailment for hire, with such liabilities as result naturally from the terms of the agreement.⁶ If a carrier exempts himself from liability for losses by fire, he remains liable as a common carrier with that exception.⁷ On the other

¹ Ante, §§ 562, 480.

² *Alexander v. Greene*, 3 Hill, 9; 7 Hill, 533; *Wells v. Steam Nav. Co.*, 2 N. Y. 204; *Caton v. Rumney*, 13 Wend. 387; *Thompson v. Bliss*, 15 Albany Law Journal, 296, and cases there cited; *Brown v. Clegg*, 63 Penn. St. 41; 9 Wall. 665; 16 Wall. 177.

³ *Milton v. Hudson River S. Co.*, 37 N. Y. 210; *Arctic Fire Ins. Co. v. Austin*, 54 Barb. 559.

⁴ *Wells v. Steam Nav. Co.*, 2 N. Y. 208; 8 N. Y. 375; *French v. Buffalo, N. Y. & Erie R. R. Co.*, 4 Keyes, 108; *Wooden v. Austin*, 51 Barb. 9; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485.

⁵ *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370; *Canfield v. Baltimore & Ohio R. R. Co.*, 93 N. Y. 532; *Holsapple v. R. W. & O. R. R. Co.*, 86 N. Y. 275; *Kenney v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 422; *McKinney v. Jewett*, 90 N. Y. 270; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438.

⁶ *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 493; 4 Sandf. R. 136; *Wyld v. Pickford*, 8 Mees. & Welsb. 443.

⁷ *Farnham v. Camden & Amboy R. Co.*, 55 Penn. St. 53; 6 How. U. S. 344, 384.

hand, if he makes a general contract for the conveyance of live stock retained in the shipper's care and custody, he becomes a bailee for hire, and his responsibility arises out of his contract.¹ And he must perform the contract according to its true intent and purport.² The burden of proof rests with the plaintiff, bringing an action on a special agreement; or where he sues on a contract by the carrier, containing an exemption from certain risks. The plaintiff must establish his cause of action, by showing a loss within the scope of the carrier's undertaking; and to do this, he may be obliged to prove the actual cause of the loss.³

§ 687. Matters of defense to actions against common carriers, being for the most part of a negative character, need not be considered at length. It will be sufficient to notice a few special defenses or situations.

1. Carrying goods in a sealed railroad car (in the Blue Line), to be delivered unbroken, the essence of the carrier's contract is to carry and deliver the goods safely; and the carrier is not guilty of a conversion of the goods where he removes them, for a good reason, into another car.⁴

2. The carrier cannot be held liable to a stranger, there being no subsisting relation of contract between them; as where a passenger has the money of a friend in his custody, and is killed by the falling of a railroad bridge and burned up with the money.⁵ A bailee of money, having properly delivered it to the carrier, might recover against the carrier the amount lost or consumed.⁶

3. A carrier may set up as a defense to an action for goods by the shipper, that the same were taken from him under legal process in a

¹ Penn v. Buffalo & Erie R. Co., 49 N. Y. 204; opinion by MILLER, J., in French v. Buffalo, N. Y. & Erie R. R. Co., 4 Keyes, 108; ante, § 237.

² Keeney v. Grand Trunk R. Co., 47 N. Y. 525.

³ "The dangers incident to railroad transportation, fire, and all other unavoidable accidents excepted." Under this clause, the burden of proof is with the shipper. Cotton v. Cleveland & P. R. Co., 67 Penn. St. 211; held the same under a like limitation; N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. U. S. 344, 384; and in Farnham v. Camden & Amboy R. Co., 55 Penn. St. 53; and in Lamb v. Camden & Amboy R. R. Co., 46 N. Y. 271; and in Whitworth v. Erie Ry. Co., 87 N. Y. 413, 419; and in Cochran v. Dinsmore, 49 N. Y. 249.

⁴ Commonwealth v. Power, 7 Met. R. 596; Hale v. Power, 12 Met. R. 482; Markham v. Brown, 8 N. H. 523; Flint v. N. & N. Y. Transp. Co., 34 Conn. 558; 75 Ill. 125; 55 N. Y. 108; Harris v. Stevens, 31 Vt. 79; Tucker v. Housatonic R. R. Co., 39 Ct. 447.

⁵ First National Bank of G. v. M. & C. R. Co., 20 Ohio St. 259.

⁶ Kellogg v. Sweeney, 1 Lans. 397; Woolley v. Edson, 35 Vt. 214; Casey v. Suter, 36 Md. 1.

suit brought by a third party, whereof the shipper was duly notified.¹ The carrier may also deliver the goods to the true owner on demand, and interpose the title of that party and the delivery to him as a defense to an action by the shipper;² he may likewise hold for the true owner, the consignee to whom a package of money is sent by an agent.³

4. The carrier may also set up any defense arising under the contract, by bringing himself within the exceptions contained in it; or by showing that the plaintiff has failed to fulfill its terms. *E. g.*, under an agreement made by a common carrier, that he is not to be held liable for any loss or damage, unless a claim is made therefor within so many days, a reasonable time, from the receipt of the goods or package, or from the time they were delivered by the carrier; the action is lost unless the claim is made within the stipulated time.⁴

¹ *Bliven v. Hudson River R. R. Co.*, 39 Barb. 188; 36 N. Y. 403; *Livingston v. Miller*, 48 Hun, 232; *Jewett v. Olsen*, 18 Oregon, 419; *McVeagh v. Atchison, T. & S. F. R. Co.*, 3 N. M. 205. It is otherwise where the goods are taken by an officer without legal process. *Bennett v. Am. Exp. Co.*, 83 Me. 236.

² *American Ex. Co. v. Greenhalgh*, 80 Ill. 68; *Nat. Bank of Commerce v. Chicago, B. & N. R. R. Co.*, 44 Minn. 224, 236.

³ *Thompson v. Fargo*, 49 N. Y. 188.

⁴ *Express Co. v. Caldwell*, 21 Wall. 264. The action being for a package, the defendant set up as a defense that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received, that the company should not be held liable for any loss or damage to the package whatever, unless claim should be made therefor within ninety days from its delivery to it." And the stipulation was held reasonable and valid, the time of transit being quite brief. The court cites the analogous conditions in policies of insurance, which are held valid: *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386; and like conditions in the contracts of telegraph companies. *Wolf v. Western Union Tel. Co.*, 62 Penn. St. 83; *Young v. Western Union Tel. Co.*, 34 N. Y. Supr. 390; and cases against common carriers; *Lewis v. Great Western R. Co.*, 5 Hurlstone & Norman, 867; *Southern Ex. Co. v. Caperton*, 44 Ala. 101. To the same effect, see *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438. But if the time limited is unreasonable, the failure to give the notice within such time will not bar a recovery.

CHAPTER X.

CARRIERS OF PASSENGERS.

I. DUTY TO RECEIVE AND CARRY : REGULATIONS.

§ 688. A common carrier of passengers is one who holds himself out to the public as ready to receive and carry on his route for hire all persons who apply for a passage. He assumes the character by entering upon the business, and representing himself to the community as undertaking to convey, indifferently, all such as may desire to be received as passengers.¹ His duties resemble those of the common carrier of goods; like him, he has entered into an engagement with the public, and is bound to serve all who require his services.² He has a right to demand prepayment of his hire, but is not at liberty to choose between those whom he will and will not receive; neither can he, under pretense of demanding exorbitant fare, escape from his obligation to carry any and every individual who pays or tenders to him the usual rate of fare.³

The owners of stage coaches and steamboats, and railroad companies, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal.⁴ As to what will be regarded as a legal excuse, Mr. Justice STORY, in *Jencks v. Coleman*, says :⁵ "There is no doubt that this steamboat is a common carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question then really resolves itself into the mere consideration whether there was, in the present case, upon the facts, a rea-

¹ *Middleton v. Fowle*, 1 Salk. 182, 249.

² *Messiter v. Cooper*, 4 Esp. R. 260. This is made obligatory by statute in New York. See Laws of 1892, Chap. 676, § 34. See Penal Code, § 381.

³ *Beekman v. Schenectady & Saratoga Railroad Co.*, 3 Paige Ch. R. 45.

⁴ *Bennett v. Dutton*, 10 N. Hamp. R. 481. No person can be denied the full and quiet enjoyment of the accommodations, advantages, facilities and privileges of any public conveyance on land or water, because of race, creed or color. N. Y. Laws of 1881, Chap. 400; Penal Code, § 383.

⁵ *Jencks v. Coleman*, 2 Sumn. R. 221; *Markham v. Brown*, 8 N. H. R. 523.

sonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such regulations as the proprietors may prescribe, for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat; or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and *à fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object is to interfere with the interest or patronage of the proprietors, so as to make the business less lucrative to them."¹

§ 689. It is the legal duty of the common carrier of passengers to receive and convey all orderly persons applying for a passage;² and he cannot bind himself by a valid agreement in contravention of his legal duty in this respect. He stands in a relation to the traveling public quite like an innkeeper.³ He cannot set up as a legal excuse for refusing to receive a passenger, that his line of stages run in connection with another coach which extends the line to another place, and that he has agreed with the proprietors of such other coach not to receive passengers who come from that place, on certain days, unless they come in his conveyance. If the passenger is a fit person to be admitted, and there is no evidence of a design on his part to injure the carrier's business, he is bound to receive him, notwithstanding his agreement.⁴

The duty of the carrier of passengers, to receive such as apply for a passage, is qualified and limited by the right which he has to prescribe reasonable regulations for the order and convenience of passengers; in

¹ A carrier of passengers may establish on his car or vessel an agency for the delivery of baggage, excluding others desiring to act in the same capacity. *Barney v. O., B. & H. S. Co.*, 67 N. Y. 301.

² *Higgins v. Watervliet T. & R. Co.*, 46 N. Y. 23. To wrongfully refuse to carry a passenger is an actionable tort. *Lake Erie & W. Ry. Co. v. Acres*, 108 Ind. 548; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222.

³ *Ante*, §§ 471, 472, and 520.

⁴ *Bennett v. Dutton*, 10 N. H. 481; N. Y. Session Laws of 1892, Chap. 676, § 34; *Barney v. Oyster Bay & H. Steamboat Co.*, 2 N. Y. Sup. Ct. (T. & C.) 598; *Barney v. Steamboat D. R. Martin*, 8 Alb. L. J. 54. A rule of a railroad company prohibiting passengers on its trains from wearing the uniform cap of a line of steamers running in opposition to a line of steamers running in connection with the railroad, is not reasonable and cannot legally be enforced. *South Florida Railroad Co. v. Rhoads*, 25 Fla. 40.

respect to the manner of giving and collecting tickets; for the protection of passengers from the annoyance of a clamorous solicitation by runners and agents of other carriers, hotels or inns; for the prevention of disorderly conduct in and about the places of arrival and departure; and for the protection and peace of his passengers on the journey.¹

§ 690. The carrier is not bound to receive and carry drunken or disorderly persons. He may refuse to receive a drunken man as a passenger;² and he may refuse to receive a noisy and disorderly person, or having received he may exclude him from the conveyance on that account.³ After having received a drunken or insane person and taken his fare as a passenger, the carrier cannot rightfully exclude him unless he misbehaves on the journey.⁴ The same rule has been applied, where a steamer received on board as a passenger a person of a bad or doubtful character, and afterward excluded him from the conveyance.⁵

An innkeeper, whose right and duty in this particular are nearly the same, is bound to receive as a guest every person who behaves himself properly and is ready to pay for his accommodations; and has no right to demand the name, or to inquire into the business of a traveler who stops at his house.⁶ So a passenger has a right to the presumption that he is engaged in his lawful calling, and cannot be subjected to an inquisition into his private affairs by a general and public agent. Before he can be rejected and excluded from a public conveyance, there must appear against him some valid and good reason for his exclusion; a reason which the law recognizes as sufficient to deprive him of the right which he holds in common with all other men. It must be shown that he has lost or forfeited his right.⁷

§ 691. It is the right and it is the duty of a carrier of passengers to

¹ Jencks v. Coleman, 2 Sumn. R. 221; Markham v. Brown, 8 N. H. 523; Pease v. D. L. & W. R. R. Co., 101 N. Y. 367; Fluker v. Georgia R. R. & B. Co., 81 Ga. 461.

² Vinton v. Middlesex R., 11 Allen, 304; Murphy v. Union R., 118 Mass. 228; but see Milliman v. N. Y. C. & H. R. R. Co., 66 N. Y. 642.

³ People v. Caryl, 3 Parker C. R. 326; 46 N. Y. 23.

⁴ Coppin v. Braithwaite, Exch. 8 Jurist, 875; Pearson v. Duane, 71 U. S. 605; Putnam v. Broadway & Seventh Ave. R. R. Co., 55 N. Y. 108. The carrier may lawfully expel from a car a passenger who is unable to sit up and is vomiting, whether the sickness comes from drunkenness or not. Lemont v. Washington & G. R. R. Co., 1 Mackey, 180. He may also lawfully remove at a station and put in charge of the proper authorities a passenger who has *delirium tremens*, and who frightens and annoys the other passengers. Atchison, T. & S. F. R. R. Co. v. Weber, 33 Kansas, 543; King v. Ohio & M. Ry. Co., 22 Fed. Rep. 413.

⁵ Pearson v. Duane, 4 Wall. 605; Bretherton v. Wood, 3 Brod. & B. 54.

⁶ Rex. v. Ivers, 7 Carr. & Payne, 213; 6 id. 742.

⁷ Bennett v. Dutton, 10 N. H. 481; Bennett v. Peninsular Steamboat Co., 9 C. B. 775.

prescribe and enforce reasonable rules for the preservation of social order. In a car, in the cabin of a vessel, or in the saloon of a steamboat, he has a right, and it is his duty, to enforce proper deportment and decency of speech.¹ Among those eating at the same table, he has a right to insist upon the usages of society, or that decorum which is observed among civilized people, or, as Chief-Justice Tindal puts it, conduct becoming a gentleman.² Coming together casually, in a steamer or in a railway car, a segment of the body politic, the principles governing a resident population accompany the travelers, and bind them, as members of a larger society, in their conduct towards each other. Profane, obscene or coarse language, threats of violence, that which the law punishes as disorderly conduct in a like company casually assembled in a city, is equally disorderly and reprehensible in a car or on a steamboat filled with passengers; and so justifies the carrier, as it does an innkeeper, in excluding the offender from the company, the inn or the car.³

The duty of the carrier binds him to protect a passenger against misconduct or violence from his agents and servants, and from other passengers.⁴ That is to say, it binds him to exercise the utmost vigilance in maintaining order and in guarding passengers against any violence that may be reasonably anticipated, or naturally expected to

¹ *Chamberlain v. Chandler*, 3 Mason, 242.

² *Pendergast v. Campton*, 8 Carr. & Payne, 454; *Noden v. Johnson*, 12 Q. B. 218; 2 Eng. L. & Eq. 201.

³ *Peavy v. Georgia R. R. Co.*, 81 Ga. 485. Profane cursing and swearing is treated in the statutes of New York as an offense against public decency. 2 R. S. 933, 5th ed.; *People v. Porter*, 2 Park. Cr. 14. The provisions inserted in the Penal Code in respect to profane swearing have been repealed. Drunkenness incapacitates a man in many ways. *McMahon v. Harrison*, 2 Seld. 6 N. Y. 443. It renders a man found in that condition on the streets, or in any public place, liable to arrest. *Commonwealth v. Boon*, 2 Gray (Mass.), 74; *State v. Waller*, 3 Murph. (N. C.) 229; ante, §§ 471, 472.

⁴ *Flint v. N. & N. Y. Transp. Co.*, 34 Conn. 558; *Norwich Tr. Co. v. Flint*, 13 Wall. 3; *Byrant v. Rich*, 106 Mass. 180; *Pittsburgh R. v. Hinds*, 53 Penn. St. 512; *Mulligan v. N. Y. & R. B. Ry. Co.*, 129 N. Y. 506; *Carpenter v. Boston & Albany R. R. Co.*, 97 N. Y. 494; *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 117; *Stewart v. Brooklyn & Crosstown R. R. Co.*, 90 N. Y. 588; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; *Croaker v. Chicago & Northwestern Ry. Co.*, 36 Wis. 657; *Sherley v. Billings*, 8 Bush (Ky.), 147. In *L. M. R. R. Co. v. Wetmore*, 19 Ohio St. 110, the railroad company was not held liable for a blow given in a quarrel by a servant whose business it was to check baggage. Where a passenger by his own misbehavior, while being transported, has provoked a personal encounter between himself and one of the employees of the carrier, the carrier is not liable for the results. *Scott v. Central Park, etc., R. R. Co.*, 53 Hun, 414. The carrier is not liable for an injury done to a passenger by an employee in self-defense. *New Orleans & N. R. R. Co. v. Jopes*, 142 U. S. 18.

arise under the circumstances; first, in refusing to receive drunken, disorderly or riotous persons as passengers; and second, in controlling and ejecting them from the conveyance. For a failure to exercise this police power, when the occasion requires it, the carrier is liable. He is not liable specifically for the wrongful acts of one passenger to another.¹

§ 692. To secure the safety and comfort of travelers, the proprietors of steamboats, railroads and hotels are invested with the right of preserving peace and order in the depots, stations, landing-places and grounds used by them in the transaction of their business; and this right may be enforced in a manner established by rules, or without them, by the exercise of a reasonable and proper authority reposed in them by law.² Railroad companies have also the right, by suitable regulations, to require passengers to purchase their tickets before they enter the car, and to exhibit them when requested, at any time on the journey, and finally to surrender them.³ The ticket is used as a voucher in making up the accounts of the road. It is therefore considered a reasonable regulation of the company that passengers shall preserve and show their tickets, or pay the conductor the regular fare;⁴

¹ Putnam v. Broadway & Seventh Ave. R. R. Co., 55 N. Y. 108; Pittsburgh, F. W. & C. R. R. Co. v. Hinds, 53 Penn. St. 512; Flint v. Norwich & N. Y. Transp. Co., 34 Conn. 554; 6 Blatch. C. C. R. 158; Pittsburgh & C. R. R. Co. v. Pillow, 76 Penn. St. 510; New Orleans, S. L. & Ch. R. R. Co. v. Burke, 16 Albany Law Journal, 23. See Winnegar v. Central Passenger Ry. Co., 85 Ky. 547. As to the extent of a carrier's liability for a failure to protect his passengers from the violence of strangers, see Weeks v. N. Y., N. H. & H. R. R. Co., 72 N. Y. 50, a case of robbery from the person. A railroad corporation is not liable for not preventing the use of profane and obscene language, the indecent exposure of the person and other disorderly conduct by intruders at its station, in the presence of a female passenger awaiting the arrival of a train where it is not shown that the company had notice of any facts which justified the expectation of such an exhibition of depravity. Batton v. South & North Alabama R. R. Co., 77 Ala. 591.

² Markham v. Brown, 8 N. H. 523; 12 Met. 482; 7 Met. 596; 2 Sumn. R. 221.

³ Pullman Palace Car Co. v. Reed, 75 Ill. 125; Havens v. H. & N. H. R. Co., 28 Conn. 88; Maples v. N. Y. & N. H. R. Co., 38 Conn. 557; Hibbard v. N. Y. & Erie R. Co., 15 N. Y. 455; Townsend v. N. Y. C. & H. R. R. R. Co., 56 N. Y. 295; Pease v. D. L. & W. R. R. Co., 101 N. Y. 367; Lynch v. Metropolitan El. R. Co., 90 N. Y. 83.

⁴ Downs v. N. Y. & N. H. R. Co., 36 Conn. 287; Standish v. Narragansett Steamship Co., 111 Mass. 512; Crawford v. Cincinnati, etc., R. R. Co., 26 Ohio St. 580; Shelton v. Lake Shore, etc., Ry. Co., Id. 214. A party riding on a commutation ticket is also bound to show it on request, or pay his fare; 36 Conn. 287; but where he has it on his person, and the general fact that he has such a ticket is known to the conductor, his failure to find it on the instant will not justify his expulsion from the car. He is entitled to a reasonable time to search his pockets or clothes for it. Maples v. N. Y. & N. H. R. Co., 38 Conn. 558. The loss of a ticket for a berth in a sleeping car, after buying and paying for it, does not justify the conductor who has evidence of the facts in expelling the passenger from the car; and it has been held

that they shall use or ride on the ticket according to the agreement, fixing the train or the time or the season for its use;¹ and that a rule or custom is reasonable which requires passengers soon after starting to surrender their tickets to the conductor and receive his checks in place of them;² there being a perfect reciprocity in the custom, securing to the passenger a token or evidence of his right to a passage on the train.³

§ 693. The regulations of a railroad must be reasonable and consistent. The company cannot require a passenger to procure his ticket beforehand, unless they furnish him the facilities or give him the opportunity of doing so; and they cannot charge him a higher rate for omitting to do what they render impracticable.⁴ Admitting a regulation to be valid, requiring a passenger to pay an increased rate where he does not procure his ticket before entering the car,⁵ the rule is not reasonable or valid where it is the fault of the company that a passenger does not procure his ticket. They must keep their office for the sale of tickets open, with an agent in it ready to supply the demand, or they cannot make an extra charge for the omission.⁶

that the Palace Car Company is liable in damages for the act of expelling him, but not liable in exemplary damages. *Pullman Palace Car. Co. v. Reed*, 75 Ill. 125.

¹ "Good this date only," stamped on the ticket, at the time it is purchased, becomes a part of the contract. *Elmore v. Sands*, 54 N. Y. 512; *Boston & Lowell R. Co. v. Proctor*, 1 Allen, 267; *Barker v. Coffin*, 31 Barb. 556; *Boice v. Hudson R. R. Co.*, 61 Barb. 611; *Shedd v. Troy & Boston R. Co.*, 40 Vt. 88; *Deitrich v. Penn. R. Co.*, 71 Penn. St. 432; *Hamilton v. N. Y. C. R. R. Co.*, 51 N. Y. 100; *Hill v. S. B. & N. Y. R. Co.*, 63 N. Y. 101; *Little Rock, etc., Ry. v. Dean*, 43 Ark. 529; *Lillis v. St. Louis, etc., R. R. Co.*, 64 Mo. 464; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *Pennington v. Philadelphia, etc., R. R. Co.*, 62 Md. 95.

² *Northern Railroad Co. v. Page*, 22 Barb. 130; *Loring v. Alborn*, 4 Cush. R. 608; *Cheney v. B. & M. R. R. Co.*, 11 Met. 123.

³ The conductor may take up the tickets in this manner, on giving a check. *State v. Thompson*, 20 N. H. 250; *Havens v. Hartford R.*, 28 Conn. 69; *Cleveland R. v. Bartram*, 11 Ohio St. 457; *Jennings v. Great Northern R. L. R.*, 1 Q. B. 7. The question as to the validity of the regulation is one of law. *Vedder v. Fellows*, 20 N. Y. 126; *People v. Caryl*, 3 Parker C. R. 326.

⁴ *Nellis v. N. Y. Central R. Co.*, 30 N. Y. 505; *White v. Chesapeake, etc., Ry. Co.*, 26 W. Va. 800.

⁵ *Hillard v. Goold*, 34 N. H. 230; *State v. Goold*, 53 Me. 279; *St. Louis R. v. South*, 43 Ill. 176; *Crocker v. New London, etc., R. R. Co.*, 24 Conn. 249; *Bordeaux v. Erie Ry. Co.*, 8 Hun, 579; *O'Brien v. N. Y. C. & H. R. R. Co.*, 80 N. Y. 236.

⁶ *Porter v. N. Y. Central R. R. Co.*, 34 Barb. 353; *Chicago R. v. Parks*, 18 Ill. 460; *Jeffersonville R. v. Rogers*, 28 Ind. 1; 30 N. Y. 505; *Iowa v. Chovin*, 7 Iowa, 204; *St. Louis, etc., R. R. Co. v. South*, 43 Ill. 176; *Chicago, etc., R. R. Co. v. Flagg*, 43 Ill. 364; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; *Indianapolis, etc., R. R. Co. v. Rinard*, 46 Ind. 293; *Du Laurans v. St. Paul, etc., R. R. Co.*, 15 Minn. 49; *Swan v. Manchester, etc., R. R.*, 132 Mass. 116. See *Bordeaux v. Erie Ry. Co.*, 8 Hun, 579.

§ 694. The regulations of a railway carrier must be fairly and reasonably enforced. Having a right to exclude a man from a car, for refusing to show his ticket or pay his fare, or for disorderly conduct, the company must answer for the manner in which this right is exercised. The law does not permit the use of any more force than is necessary, and it holds the company liable as principal for the use of any excess of force by its agent, the conductor, beyond what is necessary and proper to accomplish the removal. Without holding the company liable for the agent's willful and malicious violence outside of the scope of his employment, it does hold them answerable for the force used by their agent acting under their instructions, in the line of his duty; both when he exceeds his duty through an error of fact, and when he overdoes it through zeal and impetuosity of temper.¹

When the conductor acts in good faith, enforcing a reasonable and lawful regulation, under circumstances which do not justify his act in expelling a passenger from a car, the company is not liable in punitive damages. The rule of damages is the same, when the action is brought against the company, as it is when brought against a natural person or the agent himself.² The rule was so applied on the Hudson River Railroad, on this statement of facts: The plaintiff purchased a ticket at Sing Sing for Rhinebeck, and went on board of a train going no farther north than Poughkeepsie; after the train passed Peekskill, the plaintiff on the conductor's call for tickets surrendered his, receiving back no check or voucher showing his right to a passage upon any train of the road, and requesting none; upon the arrival of the train at Poughkeepsie, where it stopped, the plaintiff got out and waited for another train going north and stopping at Rhinebeck; the plaintiff then entered the car, and when called upon for his ticket, told the conductor that his ticket had been taken up by the other conductor, which was confirmed by some of his fellow passengers: the conductor then told the plaintiff that it was his duty to obtain a ticket or collect the fare, and that the other conductor would make it right with him; plaintiff refused to pay, and was ejected from the car, at a regular station.

¹ *Higgins v. Watervliet T. & R. Co.*, 46 N. Y. 23. Here the conductor ejected the plaintiff from a car as a disorderly person, and it was found on the trial that the plaintiff was not in fact disorderly, and the company was held liable. In *Jackson v. Second Avenue R. R. Co.*, 47 N. Y. 474, the company was held liable for excessive force used with some temper. See also *Sandford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *Seymour v. Greenwood*, 7 H. & N. 356; *Coleman v. N. Y. & N. H. R.*, 106 Mass. 160; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *Chicago, etc., Ry. Co. v. Barrett*, 16 Ill. App. 17; *Peck v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 587, 591.

² *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Townsend v. N. Y. C. & Hudson River R. Co.*, 56 N. Y. 295.

Hereupon the court ruled that the regulation calling for a ticket, check or fare from each passenger, under the penalty of being expelled from the conveyance, was in itself reasonable; that the negligence of the first conductor in taking up the ticket, without giving the plaintiff a check, was wrongful and inexcusable, so that the road was liable for the act of ejecting the plaintiff from the car; and further, that the conductor, acting as he believed in the performance of his duty, in expelling the plaintiff from the car, could not be held liable in punitive damages; ¹ and that the company, the principal, could not be held liable under a rule any more severe.² The court further holds that the wrongful taking of a ticket from a passenger, as in this case, does not justify the passenger in asserting his right to a passage on another train by force. For the same reason the carrier cannot use force to detain a passenger as he is about to leave a boat, more than a reasonable time to inquire into the truth of his allegation regarding the loss of his ticket.³

§ 695. It is the duty of common carriers of passengers to keep their engagements with the public in receiving passengers and in starting their coaches, boats or trains on time.⁴ It is also their duty to supply them with the usual accommodations and board, where the fare covers both the passage and board.⁵ Receiving passengers on board of a railroad train, it is the carrier's duty to furnish them with room in a car, and seats, so as to enable them to ride in the usual manner; it is the conductor's business to enforce the rules of the road and clear the seats that are improperly occupied, for the use of passengers who are standing within the car or upon the platform.⁶

Those who secure a passage in a stage coach, on a steamboat, in a palace or sleeping car, stipulate for a seat, berth or state-room, as one does for a reserved seat at a concert. There is nothing to interfere with the freedom of the parties in making the contract.⁷ Passengers entering an ordinary car are allowed to choose their seats for themselves; and

¹ *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25.

² *Townsend v. N. Y. Cen. & H. River R. Co.*, 56 N. Y. 295.

³ *Standish v. Narragansett Steamship Co.*, 111 Mass. 512.

⁴ *Heirn v. McCaughan*, 32 Missis. 17; *Whitsell v. Crane*, 8 Watts & Serg. 369; *Denton v. Great Northern R.*, 5 Ellis & B. 860; *Sears v. Eastern R.*, 14 Allen (Mass.), 433.

⁵ *Adderly v. Cookson*, 2 Campb. 15; *Siordet v. Brodie*, 3 Campb. 253.

⁶ *Willis v. Long Island R. Co.*, 32 Barb. 398; S. C. 34 N. Y. 670. A sleeping car company will be held liable for excluding a passenger from a berth assigned him and for which he has offered to pay. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222.

⁷ *Long v. Horne*, 1 Carr. & P. 610; *Deevort v. Loomer*, 21 Conn. 245; *Galena R. v. Yarwood*, 15 Ill. 468.

this choice is tacitly respected by the carrier and by the traveling public. Has the carrier a right to make a regulation requiring negroes to sit by themselves at one end of the car? Or excluding them from the cabin of a steamboat? Regulations of this kind have been held valid in States where the colored population is relatively small; on the ground that it is the duty of the carrier to guard and secure the comfort and convenience of the community at large, rather than that of individuals.¹ The decisions quietly assume that the comfort and convenience of the community are in some way dependent upon the regulation. The fact thus assumed is not recognized in this State, where the law accords to every citizen the full and equal enjoyment of any accommodation, advantage, facility or privilege furnished by common carriers on land or water; and declares expressly that a citizen shall not by reason of race, color or previous condition of servitude be excluded from public houses, theaters, common schools, public institutions of learning or cemeteries.² And now, under the act of Congress, all persons within the jurisdiction of the United States are entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.³

§ 696. A railroad carrier is answerable for the safe and proper construction of its depots, stations, platforms and the approaches used in receiving or landing passengers.⁴ It is bound to keep them in a suitable

¹ *Day v. Owen*, 5 Mich. 520; *West Chester R. v. Miles*, 55 Penn. St. 209. See *Turner v. North Beach R.*, 34 Cal. 594; *Pleasants v. North Beach R.*, 34 Cal. 586; *Tarbell v. Central Pacific R.*, 34 Cal. 616. See *Chicago & N. R. Co. v. Williams*, 55 Ill. 185.

² New York Laws of 1873, Chap. 186, p.; 303 Laws of 1881, Chap. 400; N. Y. Penal Code, § 383.

³ The statute is broader and also less broad than that of New York; it applies to "all persons," and it does not apply to common schools and institutions of learning. See Civil Rights Bill, Chapter 114, passed at Second Session Forty-third Congress, and approved March 1, 1875. Senator Sumner died in March, 1874, bequeathing his Civil Rights Bill to the care of his friends, and his will took effect according to his intent.

A railroad corporation may make a regulation setting apart one car of a train for females traveling alone or without male relatives or friends. *Peck v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 587.

⁴ *Jeffersonville, etc., R. R. v. Riley*, 39 Ind. 569; *McDonald v. Chicago & N. W. R. R.*, 26 Iowa, 124; *S. C. 29 Iowa*, 170; *Tobin v. P., S. & P. R. R. Co.*, 59 Maine, 183; *Knight v. P., S. & P. R. R.*, 56 Maine, 234; *McElroy v. Nashua & Lowell R. Co.*, 4 Cush. 400; *Penn. R. Co. v. Henderson*, 51 Penn. St. 315.

It is the duty of the company to keep the sidewalks leading from its depot to a public street in good repair; *Bateman v. N. Y. C. & H. R. R. Co.*, 47 Hun, 429;

and safe condition for the accommodation of passengers; and properly lighted in the night time, so as to render the entrance and the egress convenient and safe.¹ The same legal duty rests upon carriers by water, in respect to the appliances used in receiving or landing passengers.² Parties waiting in a station to take the cars, or at a landing to take the boat, already stand in the relation of passengers, and are entitled to protection in that capacity.³

§ 697. Regulations by the carrier determining his mode of doing business and his manner of receiving and carrying passengers are valid; as that passengers shall ride on passenger trains, and in the cars provided for them; and not on the engine, or in a caboose car attached to a freight train.⁴ It is the right of the railroad company to separate the business of carrying freight from the business of carrying passengers; and they may enforce the rule by refusing to receive passengers on board of a freight train, or within a freight car attached to a passenger train. We find no dissent from this proposition. Hence a trespasser, one who intrudes upon a car not used for the conveyance of passengers, and remains there in violation of the rules of the road, and is in no way recognized by the company as a passenger, cannot claim protection on the theory of an implied contract.⁵ The railroad company owe him the same duty which they owe to a stranger, and no other or different. He cannot demand protection as a passenger, not having been received in that capacity;⁶ and he may reasonably insist upon that degree of care which is due from one man to another, independent of any relation of contract

and to provide for the passenger a safe passage to the train he expects to take, and to take reasonable care that he shall not while on the premises be exposed to any unnecessary danger, or to one of which it is aware. *Carpenter v. Boston & Albany R. R. Co.*, 97 N. Y. 494. It should not provide a station platform higher than the car steps, nor should it require passengers to board a train from a baggage car. *Turner v. Vicksburg, etc., R. R. Co.*, 37 La. Ann. 648.

¹ *March v. Concord R. Cor.*, 29 N. H. 9; *Martin v. Great N. Railway Co.*, 30 Eng. Law & Eq. 473; *Beard v. Ct. & P. Rivers R. R. Co.*, 48 Vt. 191; *Nicholson v. L. & Y. Railway Co.*, 3 Hurl. & N. 534; *Hurlbert v. N. Y. Central R. R. Co.*, 40 N. Y. 145; *Reynolds v. Texas & Pacific Ry. Co.*, 37 La. Ann. 694; *Fordyce v. Merrill*, 49 Ark. 277.

² *John v. Bacon*, L. R. 5 C. P. 437; *Crocheron v. Ferry Co.*, 1 N. Y. Sup. Ct. 446; ante, §§ 505, 507.

³ *Gordon v. Grand St. & N. R. R. Co.*, 40 Barb. 546; 4 Lans. 198; *Packet Co. v. Clough*, 20 Wall. 528; *Snow v. Fitchburg R. R. Co.*, 136 Mass. 552; *Carpenter v. Boston & Albany R. R. Co.*, 97 N. Y. 494.

⁴ *Robertson v. N. Y. & Erie R. R. Co.*, 22 Barb. 91; *Eaton v. Delaware, L. & W. R. R. Co.*, 57 N. Y. 382; *Spooner v. Brooklyn City R. R. Co.*, 36 Barb. 217.

⁵ *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

⁶ *Lugo v. Newbold*, 9 Exch. 302; *Bissell v. Mich. Southern & N. I. Co.*, 22 N. Y. 259, 280, 306.

subsisting between them; care not to injure him by any affirmative act, or by any gross negligence.¹

The relation of contract arises where a person openly takes a seat in a car used for conveying passengers. Being a passenger, he does not forfeit his right to protection by going into and taking a seat in the baggage car, with the conductor's assent.² The rule is different where a person is received to ride in the baggage car, the passenger car being full, and he goes upon another car and is injured.³

Admitting the right of the company to refuse to carry passengers in the caboose car attached to a freight train, the law also permits them to receive and carry passengers in that conveyance. And if they so receive a person, and take fare from him, or recognize his ticket as evidence of his right to a passage, they assume the same liability to carry him safely as upon an ordinary passenger train.⁴ On the other hand, when the printed regulations of the company prohibit the carrying of passengers in that car, and no fare is claimed or paid or expected, the conductor cannot render the railroad liable as a passenger carrier of persons received by him into that car.⁵

§ 698. The liability of the carrier does not necessarily rest upon the basis of a contract. The railway company is liable as a carrier to any person who is lawfully upon the train; and it has been questioned whether the company can avail itself of a rule adopted for the government of its agents and servants prohibiting the carrying of passengers in a saloon car, attached to a freight train, where the conductor receives

¹ *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Hounsell v. Smyth*, 97 Eng. Com. Law, 731; *Driscoll v. Newark & R. Cement Co.*, 37 N. Y. 638; *Southcote v. Stanley*, 1 Hurl. & N. 246; *Balch v. Smith*, 7 Hurl. & N. 732; *Corrigan v. Union Sugar R.*, 98 Mass. 577; *St. Peter v. Denison*, 58 N. Y. 416; *Bush v. Brainard*, 1 Cowen, 78; *St. Joseph & W. R. R. Co. v. Wheeler*, 35 Kansas, 187.

² *Carroll v. N. Y. & N. H. R. R. Co.*, 1 Duer, 571; *Lackawanna R. v. Chenewith*, 52 Penn. St. 382. A passenger has no remedy for injuries received while voluntarily and unnecessarily riding in a baggage car without the knowledge of the conductor, if the injuries would not have been received had he been in a passenger car. *Kentucky Cent. R. R. Co. v. Thomas, Admr.*, 79 Ky. 160; *Houston & T. C. R. R. Co.*, 55 Texas, 88. The rule is the same where the passenger voluntarily rides in a baggage car by permission of the conductor, but in violation of the rules of the road conspicuously posted in that car. *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 21.

³ *Galena R. v. Yarwood*, 15 Ill. 468.

⁴ *Edgerton v. N. Y. & Harlem R. R. Co.*, 35 Barb. 193; *S. C.* 39 N. Y. 227; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187; *International & Great Northern R. R. Co. v. Irvine*, 64 Texas, 529; *New York, etc., R. R. Co. v. Doane*, 115 Ind. 435; *Quackenbush v. Chicago, etc., R. R. Co.*, 73 Iowa, 458.

⁵ *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382; 22 Barb. 91; *Contra, Dunn v. Grand Trunk R. Co.*, 58 Maine, 187. See *McGee v. Missouri Pacific Ry. Co.*, 92 Mo. 208; *Perkins v. Chicago, etc., R. R. Co.*, 60 Miss. 726.

him into that car, and he has no notice of the rule.¹ The public naturally assume that the agent of a road is acting within the line of his authority, and in conformity with the by-laws of the corporation. But passing this question, it appears to be well settled that a carrier of free passengers is bound for the same diligence and skill as he is when carrying passengers for hire;² and that a person riding under a contract between other parties, like a mail agent or an express messenger, is entitled to the same protection as a passenger paying his own fare;³ and further, that an infant child, paying no fare under the custom of a road, is entitled to the same equal and just protection.⁴

II. PAYMENT OF FARE.

§ 699. A carrier of passengers, like a common carrier of goods, has a right to demand payment of his hire in advance, as a condition precedent to his receiving a person as a passenger. Passage money, or fare, and freight are governed by the same rules.⁵ Where a person takes his place in a stage coach, and pays at the time only a part of the fare as a deposit, the proprietor is at liberty to fill up his place with another passenger, provided the first is not at the inn ready when the coach sets off.⁶ But where at the time of taking his place he pays the whole fare, the proprietor cannot dispose of his seat to another; for the passenger may take it at any stage of the journey he thinks proper, at the place most convenient to him. Having permitted a passenger to get into the stage at the usual hour of departure, and have his luggage fastened on, the owner cannot, on being tendered his hire, refuse to go the journey;

¹ *Dunn v. Grand Trunk R. Co.*, 58 Maine, 187; *Lackawanna & B. R. Co. v. Chenevith*, 52 Penn. St. 382; *McGee v. Missouri Pacific Ry. Co.*, 92 Mo. 208.

² *Perkins v. N. Y. Central R. Co.*, 24 N. Y. 196; *Philadelphia & R. R. Co. v. Derby*, 14 How. U. S. 468; *Steamboat New World v. King*, 16 How. U. S. 477; *Doran v. East River Ferry Co.*, 3 Lansing, 105; *Gill v. Middleton*, 105 Mass. 479; *Wilton v. Middlesex R. R.*, 107 Mass. 108; *Wagner v. Missouri Pacific Ry. Co.*, 97 Mo. 512; *Louisville, N. A. & C. R. R. Co. v. Taylor*, 126 Ind. 126.

³ *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Nolton v. Western R. Cor.*, 15 N. Y. 444; *Gulf, C. & S. F. R. R. Co. v. Wilson*, 79 Texas, 371; *Blair v. Erie Ry. Co.*, 66 N. Y. 313; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562; *Brewer v. N. Y., L. E. & W. R. R. Co.*, 124 N. Y. 59. See *Union Pacific R. Co. v. Nichols*, 12 American R. 475, where the agent took in a man to teach him the business, and the conductor permitted him to remain, supposing him to be an agent of the express company, and he was injured.

⁴ *Austin v. Great W. R. R.*, Law Rep. 2 Q. B. 442. The child in this case should have paid half fare under the statute; and nothing was paid or demanded. And see *Metropolitan Street Ry. Co. v. Moore*, 83 Ga. 453.

⁵ *Moffatt v. East India Co.*, 10 East, 468; *Watson v. Duykinck*, 3 John. R. 335; *Briggs v. Austin*, 3 Pick. 20; 1 Peters' Adm. R. 126, 206; ante, § 639.

⁶ *Ker v. Mountain*, 1 Esp. 27.

because this is such an inception of the contract that he is bound to go through with it.¹

Under the general custom, a passenger's fare covers and includes a compensation for the conveyance of his baggage. And hence where there is no special usage or regulation, charging freight or luggage exceeding a certain weight, payment of the usual fare entitles a passenger to carry with him his baggage; including wearing apparel and all such articles of convenience and comfort as may be reasonably carried in that manner, considering the nature of the journey.² A gold watch or an opera glass may be carried as baggage.³

§ 700. Railroad carriers of passengers have the same right to demand payment of the fare in advance as other carriers. They may refuse to allow a passenger to get on board without a ticket; and they may in this State put him off at a regular station or near some dwelling-house, on his refusing to pay his fare; ⁴ using all proper care not to injure him in doing so.⁵

After a passenger has refused to pay his fare and the train has been stopped for the purpose of putting him off, a subsequent offer to pay does not give him a right to remain, does not take from the conductor the right to exclude him from the car.⁶ So having been put off the train for that cause, he does not gain the right to re-enter immediately, on tendering the fare or a valid ticket.⁷ He forfeits his right to continue his journey on the train.

May a railroad company demand an increased rate of fare, on account of a passenger's neglect to procure his ticket before entering the car? Our courts have hesitated to hold the affirmative of this proposition, couched in this form; and yet there is good authority upholding the right of the company to adopt the ticket system and allow passengers purchasing tickets to ride at a less rate than that charged to those pay-

¹ *Jeremy on Car.* 23; 4 *Esp.* 260; *Buffit v. Troy & Boston R. R. Co.*, 36 *Barb.* 420; *S. C.* 40 *N. Y.* 168; *Frink v. Schroyer*, 18 *Ill.* 416.

² *Pardee v. Drew*, 25 *Wend.* 459; *Hawkins v. Hoffman*, 6 *Hill*, 586; *Merrill v. Grinnell*, 30 *N. Y.* 594; 42 *N. Y.* 326; ante, §§ 502, 569-571, 574-576; *Jones v. Norwich & N. Y. Transp. Co.*, 50 *Barb.* 193.

³ *Toledo, Wabash, etc., R. R. v. Hammond*, 33 *Ind.* 379; *American C. Co. v. Cross*, 8 *Bush (Ky.)*, 472.

⁴ *People v. Jillson*, 3 *Park. Cr. R.* 234; *Laws of 1890*, Chap. 565, § 40.

⁵ *Sanford v. Eighth Ave. R. Co.*, 23 *N. Y.* 343.

⁶ *People v. Jillson*, *supra*; *Hibbard v. N. Y. & Erie R. Co.*, 15 *N. Y.* 455, 461; *Cincinnati, etc., R. R. Co. v. Skillman*, 39 *Ohio St.* 444; *Hoffbauer v. D. & N. W. R. Co.*, 52 *Iowa*, 342; *O'Brien v. N. Y. C. & H. R. R. Co.*, 80 *N. Y.* 236; *Pease v. D. L. & W. R. R. Co.*, 101 *N. Y.* 367.

⁷ *State v. Campbell*, 32 *N. J.* 309; *O'Brien v. B. & W. R. R.*, 15 *Gray*, 20.

ing in the cars ;¹ on condition the company keep their offices open for the sale of tickets for a reasonable time before the train leaves.² The statute of New York adopts the principle, with the qualification. It also imposes a penalty upon the road for taking a greater rate of fare than that allowed by law.³

§ 701. When a passenger does not pay his fare in advance, the carrier has a lien therefor upon the baggage entrusted to him ; and may detain the same as a security for its payment. When he waives his right to payment in advance, he is presumed to rely upon the lien given him by law, or upon the personal responsibility of his passenger, to secure his reasonable hire. He cannot detain his passenger therefor ;⁴ and he cannot take things from his possession to secure payment of his demand.⁵

The carrier's lien does not, under the common law, involve or carry with it a power to sell or satisfy his demand. It is a naked right of detention which cannot be made available to liquidate his charge, without a legal proceeding, in the nature of a foreclosure in equity.⁶ And during the time he detains goods to enforce his lien, he is not allowed to charge for keeping them.⁷

We have seen that an innkeeper has a lien upon the goods entrusted to him by his guest, though they be the property of another person ; and it has been urged that a carrier stands in the same relation to his passenger, and should therefore have a co-extensive lien.⁸ The analogy is very strong ; and yet the better opinion is that a carrier's lien for freight arises out of a contract by the owner for the conveyance of the goods, and that it cannot be enforced against the owner where the goods are

¹ *St. Louis R. v. South*, 43 Ill. 176 ; *State v. Goold*, 53 Maine, 279 ; *Hilliard v. Goold*, 34 N. H. 230 ; *People v. Jillson*, supra ; *Crocker v. New London R.*, 24 Conn. 249.

² *Porter v. N. Y. Central R. R. Co.*, 34 Barb. 353 ; *Nellis v. N. Y. Central R. Co.*, 30 N. Y. 505 ; 28 Ind. 1 ; *Du Laurans v. St. Paul & Pacific R. R. Co.*, 2 American R. 102, note 108 ; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116. See *Bordeaux v. Erie Ry. Co.*, 8 Hun, 579.

³ *Chase v. N. Y. Central R.*, 26 N. Y. 523 ; 46 N. Y. 644 ; *Lewis v. N. Y. Central R.*, 49 Barb. 330.

⁴ *Wolf v. Summers*, 2 Campb. 631 ; *Sunbolf v. Alford*, 3 Mees. & Welsb. 148.

⁵ *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass. 117 ; *Lynch v. Metropolitan Elevated Ry. Co.*, 90 N. Y. 77.

⁶ *Saltus v. Everett*, 20 Wend. 267 ; *Briggs v. Boston R.*, 6 Allen, 246 ; *Hunt v. Haskell*, 24 Maine, 339 ; *Staples v. Bradley*, 23 Conn. 167. A mortgagee or pledgee may bring an action in equity demanding a sale of the property. *Brigg v. Oliver*, 68 N. Y. 336, 339.

⁷ *Somes v. British Empire Shipping Co.*, 3 H. L. Cas. 338.

⁸ *Grinnell v. Cook*, 3 Hill, 490 ; *York v. Grenaugh*, 2 Ld. Raym. 867 ; *Johnson v. Hill*, 3 Stark. R. 172.

carried at the request of a bailee or of a party acquiring the possession of them by fraud.¹

III. THE CONTRACT.

§ 702. We give but little attention to those contracts which are most frequently made, those which result from a general order given, or from some action taken under a custom or course of business. A traveler buys a railroad ticket, without much considering the effect of his purchase. He applies to an agent of the company for a ticket to a given place on the line of the road; he pays the fare and goes on board of the right train, with his ticket as a voucher or token of his right to a passage. However general or few the words used, the contract is well defined; it binds the carrier to convey the passenger with his baggage to the place indicated on his ticket. The contract is the same where a passenger takes passage on a steamboat.² The carrier also engages to convey the passenger with all reasonable diligence to the place of his destination; he engages, under ordinary circumstances, to convey the passenger within the advertised time.³

For a breach of the carrier's engagement to make the connections or to convey his passenger within the time specified in the published timetable, the law allows the injured party to recover the direct and natural damages resulting from the delay. It does not allow him to recover remote or speculative damages;⁴ as in other cases, it limits the recovery to such damages as might be reasonably expected to result from the delay.⁵

When a passenger is seriously injured by the delay, he is entitled to recover the damages thereby sustained; and the railroad carrier cannot escape liability by showing that the delay arose from the willful act of the conductor.⁶

¹ *Gilson v. Gwinn*, 107 Mass. 126; *Bassett v. Spofford*, 45 N. Y. 387; *Fisk v. Newberry*, 1 Doug. Mich. R. 1; *Buskirk v. Purington*, 2 Hall, 561, 569.

² *Jones v. Norwich & N. Y. Transp. Co.*, 50 Barb. 193; 45 N. Y. 184.

³ *Denton v. Great Northern R. Co.*, 5 El. & Bl. 860; *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408. The contract is to be established as a matter of fact. *Hurst v. Great Western R. Co.*, 19 C. B. N. S., 310.

⁴ *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408; *Benson v. N. J. R. & Tr. Co.*, 9 Bosw. 412; *Woodyear v. Great Western R. Co.*, L. R. 2 C. P. 318; *Hobbs v. London & Southwestern R. Co.*, L. R. 10 Q. B. 111; *Denton v. Great Northern R. Co.*, 5 El. & Bl. 860; contract evidenced by an excursion ticket good for fourteen days; *Great Northern R. Co. v. Hawcroft*, 21 L. J. Q. B. 178.

⁵ *Hadley v. Baxendale*, 9 Exch. 341; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131, 140.

⁶ *Weed v. Panama R. Co.*, 17 N. Y. 362; 20 N. Y. 48; *Meyer v. Second Ave. R. Co.*, 8 Bosw. 305; *Shea v. Sixth Avenue R. Co.*, 62 N. Y. 180.

§ 703. When in England two or more railroad companies unite to form an extended line, on which passengers are booked through, the contract is between the passenger and the company issuing the ticket.¹ And our rule is the same where the company issuing the ticket contracts for the entire distance;² and the contract is fairly established by all the facts and circumstances.³

The contract is with the connected roads as joint contractors, when they are jointly concerned in the business of carrying passengers and there is a community of interest between them in the sale of tickets;⁴ as where the tickets are sold by an agent acting for both roads, and the transportation is effected by the united agency of the roads, thus practically consolidated in the business.⁵

When one of several connecting roads sells the tickets of the different roads, with authority from each, printed on one slip of paper and capable of being readily detached, on an agreement dividing the proceeds between the roads rateably; each road makes a contract with the passenger covering its own line. The company selling the ticket over the connecting road acts as an agent; and each road is liable to the passenger for any failure in duty on its line⁶—liable on the theory of contract. The same principles apply to the contract for the conveyance of passengers which apply to contracts for the transportation of goods.⁷

§ 704. The law of the State where a contract is made and is to be

¹ *Mytton v. Midland R. Co.*, 4 H. & N. 615; *Coxon v. Great Western R. Co.*, 5 H. & N. 274; *Bristol, etc., R. Co. v. Collins*, 7 H. L. Cas. 194.

² *Weed v. Saratoga & S. R. Co.*, 19 Wend. 531; *Burtis v. Buffalo & State Line R. Co.*, 24 N. Y. 269; *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37; 29 Barb. 35; 53 N. Y. 363, 370; *Ill. Central R. Co. v. Copeland*, 24 Ill. 332; *Little v. Dusenberry*, 46 N. J. L. 614. See *Laws of 1892*, Chap. 676, § 48.

³ *Williams v. Vanderbilt*, 28 N. Y. 217; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Quimby v. Vanderbilt*, 17 N. Y. 306; 45 N. Y. 184, 189.

⁴ *Wylde v. Northern R. R. Co. of N. J.*, 53 N. Y. 156; *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37.

⁵ An appointment by several roads of a common agent to sell coupon tickets over their roads does not make them partners. *Sprague v. Smith*, 29 Vt. 421; *Harton v. Eastern R.*, 114 Mass. 44; *Straiton v. N. Y. R.*, 2 E. D. Smith, 184. And while it is quite feasible for these companies to unite their business in such a manner as to create a partnership, we do not often find them doing so. See *Railroad Co. v. Harris*, 12 Wall. 65, 85; *Najac v. Boston R.*, 7 Allen, 329; *Carter v. Peck*, 4 Smedl. 203; *Northern Central Ry. Co. v. Scholl*, 16 Md. 331; *Ill. Central R. v. Copeland*, 24 Ill. 332; 17 N. Y. 306; 29 Barb. 35; *Glaser v. N. Y. R.*, 36 Barb. 557.

⁶ *Milnor v. N. Y. & N. H. R. Co.*, 53 N. Y. 363; *Kessler v. N. Y. C. & H. R. R. Co.*, 61 N. Y. 538; *S. C. 7 Lans. 62*; *Poole v. D. L. & W. R. R. Co.*, 35 Hun, 29; *Isaacson v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 278.

⁷ *Ante*, §§ 572, 577, 578.

performed determines its validity; and so where a railroad in this State contracts to convey a passenger from one place to another within its jurisdiction, with a limitation upon its liability allowed by our laws, the contract is to be enforced according to its legal effect here. *E. g.*, Ohio, which does not uphold a contract made in that State exempting a carrier from liability for the negligence of its agents and servants, will enforce a like contract made here by the Erie Railroad to be performed within this State.¹ The rule is still broader: the contract is to be construed and interpreted according to the laws of the State where it is made, unless it appears from its terms to have been entered into with a view to the laws of some other State; as where it is to be substantially performed in another State. The mere fact that a passenger on the road—on the Erie, for example—will be occasionally carried over the State line, in the execution of a contract of transportation, does not prevent its enforcement according to the law of this State, where it is made. And hence when a suit is brought here on the contract, for damages to a passenger caused by the negligence of the company at a point where the road bends into Pennsylvania, the law of this State prescribes the measure of the recovery.²

A railroad corporation organized in one State, and extending its line into another and transacting business there by its permission, does so subject to the laws of that State. It is not permitted to act under, and afterwards reject, those laws, as its interests may dictate.³

Under a contract for services, the law of the place where they are rendered governs, and controls its legal effect.⁴

The statute law of a State has no extra-territorial operation; and so the statute giving an action for damages resulting from a death caused by culpable negligence, operates only within the State.⁵ As the cause of action is created by the statute, it cannot arise outside of the jurisdiction enacting the statute. In perfect harmony with this principle, our courts give effect to the statute on navigable waters, which are within

¹ Knowlton v. Erie Railway Co., 19 Ohio St. 260. See Dike v. Erie Ry. Co., 45 N. Y. 113; Lyons v. Erie Ry. Co., 57 N. Y. 489; Curtis v. D. L. & W. R. R. Co., 74 N. Y. 116; Faulkner v. Hart, 82 N. Y. 413.

² Dike v. Erie R., 45 N. Y. 113; Curtis v. D. L. & W. R. R. Co., 74 N. Y. 120.

³ Milnor v. N. Y. & N. H. R. Co., 53 N. Y. 363.

⁴ Mullin v. Hicks, 49 Barb. 250; Waldron v. Ritchings, 3 Daly, 288; Curtis v. Leavitt, 15 N. Y. 9, 91; 33 N. Y. 615.

⁵ Whitford v. Panama Railroad Co., 3 Bosw. 67; S. C. 23 N. Y. 465. The death occurred on the Panama Railroad, a corporation organized under the laws of New York. 2 Keyes, 294; Richardson v. N. Y. C. R. Co., 98 Mass. 85; Needham v. G. T. R. Co., 38 Vt. 294; Woodward v. M. S. & N. I. R. Co., 20 Ohio St. 121; Allen v. Pittsburgh, etc., R. Co., 45 Md. 41; G. W. R. Co. v. Miller, 19 Mich. 305; Leonard v.

the boundaries of the State,¹ and on the high seas, where a citizen meets with death through culpable negligence on board a vessel hailing from and registered in a port within the State.²

§ 705. We have noticed in passing that in this State, and in some others, a gratuitous passenger may by an express contract exempt a railroad company from liability for injuries arising from the negligence of its agents and servants; ³ that a person riding on a drover's pass, issued under a contract for the transportation of cattle, who cannot be reasonably regarded as a free passenger, may by an express contract relieve the company from liability for injuries caused by the negligence of its servants; ⁴ and that a railroad carrier may, upon a sufficient consideration, contract for exemption from liability for losses arising from its own negligence.⁵

The carrier is permitted to stipulate for such exemptions from liability as the law regards just and reasonable; and the law does not regard it as just and reasonable to permit him to evade the liability fairly involved and assumed by him under the contract. An exemption from losses by fire is reasonable, unless the loss occurs through the negligence of the carrier or of his agents employed in the business.⁶

§ 706. We have seen that a person may be a passenger lawfully on a boat or in a car, where there is no contract subsisting between him and the carrier; and that he is not left without a remedy against the carrier for his acts of negligence.⁷ The same is true where he takes

Columbia Steam Nav. Co., 84 N. Y. 48; *Debevoise v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 377; *McCarthy v. Chicago, etc., R. R. Co.*, 18 Kansas, 46.

¹ *Mahler v. Norwich & N. Y. Transp. Co.*, 45 Barb. 220; reversed, S. C. 35 N. Y. 352. The injury, causing death, resulted from a collision on Long Island Sound, near Sands' Point. As to the territorial limits of the county of New York, see *Orr v. City of Brooklyn*, 36 N. Y. 661; and as to the effect of an assignment of personal property situate in another State, made here, see *Van Buskirk v. Warren*, 2 Keyes, 119.

² *McDonald v. Mallory*, 77 N. Y. 546.

³ *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Ulrich v. N. Y. C. & H. R. R. Co.*, 108 N. Y. 80; *Quimby v. Boston & M. R. Co.*, 150 Mass. 365; *Rice v. Ill. Cent. R. R. Co.*, 22 Ill. App. 643.

⁴ *Perkins v. N. Y. Central R. Co.*, 24 N. Y. 196; *Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442; *Poucher v. N. Y. Central R. Co.*, 49 N. Y. 263.

⁵ *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562, 573; *Kenney v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 422. But the contract must be made with the person carried or some one authorized to act in his behalf. *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562, 573; *Porter v. N. Y., L. E. & W. R. R. Co.*, 59 Hun, 177.

⁶ *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *Hill Manuf. Co. v. Providence & N. Y. Steamship Co.*, 113 Mass. 495; as where goods are burned through the negligence of a railroad carrier, employed by an express carrier, who has a stipulation for exemption from liability for losses by fire. *Bank of Kentucky v. Adams Ex. Co.*, 3 Otto, 174.

⁷ Ante, § 698.

passage on a public conveyance under an illegal contract, or while acting in violation of the law of the State. The carrier is not allowed to interpose a moral set-off; he is not allowed to excuse his own negligent and tortious conduct, by alleging that the passenger was also and at the same time in the act of violating some other law of the State; *i. e.*, traveling on a Sunday.¹ Putting aside the contract leaves the carrier under the obligations imposed upon him by the common law.²

IV. GENERAL LIABILITY.

§ 707. The minor duties of the carrier of passengers grow out of, and are deducible from, that general responsibility which binds him to carry safely those whom he takes into his conveyance, as far as human foresight and care will go; that is, for the utmost care and diligence of very cautious persons. The rule is less stringent than that which applies to common carriers of goods. The carrier of property insures its safety; and the carrier of passengers does not insure their safety.³ The mind does not accept this proposition, without first accepting that element of public policy which gave rise to, and still enforces, the strict liability imposed upon the common carrier of goods. If we eliminate this element from that rule of liability, reason demands that a carrier of passengers shall be held to a more strict rule of liability than a carrier of property.

Stated by itself, and considered affirmatively, the rule is sufficiently strict; the carrier of passengers engages that, so far as human care and foresight can go, he will provide for their safe conveyance.⁴ The rule requires of him the utmost foresight as to possible dangers, and the utmost prudence in guarding against them;⁵ and the rule is interpreted with direct reference to the mode of conveyance employed by the carrier.⁶ And although the same language will express the rule as applied to all carriers of passengers, requiring of each the highest degree of foresight and the utmost care and diligence of very cautious persons, the rule is not satisfied by the use of the same degree of vigilance in the conduct

¹ Carroll v. Staten Island R. Co., 58 N. Y. 126; S. C. 65 Barb. 32; Mahoney v. Cook, 26 Penn. St. 342; Phila. R. R. Co. v. Towboat Co., 23 How. U. S. 218; 29 N. Y. 115.

² Ante, §§ 377, 378. See contra, Feital v. R. R., 109 Mass. 398; Connolly v. City of Boston, 117 Mass. 64.

³ Christie v. Griggs, 2 Campb. 79; Camden & Amboy R. Co. v. Burke, 13 Wend. 611; Stokes v. Saltonstall, 13 Peters R. 181; Aston v. Heaven, 2 Esp. R. 523; 2 Kent's Comm. 600, 601; Sharp v. Grey, 9 Bing. R. 457; 29 Barb. 602, 613; McPadden v. N. Y. Central R. R. Co., 44 N. Y. 478; Railroad Co. v. Pollard, 22 Wall. 341; Baltimore & Yorktown T. R. v. Leonhardt, 66 Md. 70; Moore v. Des Moines & F. D. Ry. Co., 69 Iowa, 491; Pennsylvania Co. v. Roy, 102 U. S. 451; Chicago City R. R. Co. v. Engel, 35 Ill. App. 490; Treadwell v. Whittier, 80 Cal. 574.

⁴ Christie v. Griggs, 2 Campb. 63.

⁵ Bowen v. N. Y. Central R. Co., 18

⁶ Hegeman v. Western R., 13 N. Y. 9, 24.

of a train of cars moving at a rapid rate, as that required in the management of a stage coach moving more slowly. The diligence and forecast must be proportioned to the danger; they must be increased with the use of a new and dangerous motive power, and with the speed of the conveyance.¹

§ 708. The rule requires of the proprietors of stages the utmost caution in respect to the manner and means by which their business is carried on. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, with a coach and harness of sufficient strength, and properly made, and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and where everything has been done that human prudence can suggest for the security of the passengers, an accident may happen. The lights may in a dark night be obscured by a fog; the horses may be frightened, or the coachman may be deceived by a sudden alteration in objects near the road, by which he had been used to be directed on former journeys.² The proprietors are not answerable for injuries happening to passengers from sheer accident or misfortune. The rule does not require of them all the care, vigilance and foresight of which the human mind is capable, under the highest tension. It requires of them all the care, vigilance and foresight which they can reasonably exercise under the circumstances, considering the mode of the conveyance.³ And the rule is to be interpreted prospectively.⁴

¹ *Hegeman v. Western Railroad*, 13 N. Y. 9, 24; *Philadelphia & Reading Railway Co. v. Derby*, 14 How. U. S. 486; *Steamboat New World v. King*, 16 How. U. S. 474; *Taylor v. Grand Trunk R. R.*, 48 N. H. 313; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566.

² *Crafts v. Waterhouse*, 3 Bing. R. 321; *Ingalls v. Bills*, 9 Met. (Mass.) 1; *Derwort v. Loomer*, 21 Conn. R. 245; *Caldwell v. Murphy*, 1 Duer, 233; 11 N. Y. 416.

³ *Tuller v. Talbot*, 23 Ill. 357, 361; *Derwort v. Loomer*, *supra*; *Hall v. Conn. River Steamboat Co.*, 13 Conn. 319. It has been held that it is not error to charge the jury that a stage-coach proprietor is bound to use "the utmost care" for the safety of his passengers: *Gallagher v. Bowie*, 66 Texas, 265; and that it is no defense to an action by a passenger to recover damages for the overturning of a coach that the driver suffered the suggestions of the passenger to lead him off the roadway, or that the passenger knew of the custom of not using lights on the coach. *Anderson v. Scholey*, 114 Ind. 553. The law prohibits the employment of intemperate drivers by the owners of carriages for the conveyance of passengers; *Laws of 1890*, Chap. 568, §§ 158, 159; and prohibits the driver from leaving his team untied while passengers remain in the coach, without placing the lines in the hands of some other person so as to prevent their running. *Id.* § 160.

⁴ *Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408, 410.

§ 709. By the rules of the common law every principal is liable for the acts or omissions of his agent, and every master for those of his servant within the scope of the employment for which the agent or servant is retained. These rules apply emphatically to carriers engaged in the business of transporting passengers for hire; and though, as a general rule, the person who contracts to perform a particular service for reward is responsible only for ordinary care and diligence, the law exacts from passenger carriers and their servants extraordinary care and diligence; and hence unless the loss with which they are sought to be charged appears to have resulted from irresistible force or inevitable accident, they are not excused from liability. These rules have been often assailed as harsh and inequitable; but they are found in the code of nearly every civilized nation, ancient and modern, and are in reality founded on very manifest and sound reasons of public policy. If an injury results from the overturning of a stage, the true inquiry is whether the injury has been caused by the want of the utmost care and diligence in the carrier and his servants. Evidence which shows the want of such care and diligence is sufficient to establish his liability; but he is not liable for injuries arising from force or pure accident.¹

One who, not being a common carrier of passengers, invites another to ride with him, is not liable for so great a degree of care;² and a party engaging a carriage with horses and driver for such as may choose to ride, acting as an undertaker at a funeral, is not the principal answerable for the negligence of the driver.³

§ 710. The law requires passenger carriers to provide and use coaches and other vehicles that are safe and sufficient for the journey, or business in which they are employed;⁴ it requires them to examine their conveyances, previous to the commencement of each trip or journey, and to prepare them carefully for the road.⁵

¹ *Caldwell v. Murphy*, 1 Duer, 233; S. C. 11 N. Y. 416. It is provided by statute in New York, that the owners of every carriage running or traveling upon any turnpike road or highway for the conveyance of passengers shall be liable jointly and severally to the party injured, for all injuries and damages done by any person in the employment of such owners, as a driver, while driving such carriage, whether the accident occasioning such injury or damage be willful or negligent or otherwise, in the same manner as such driver would be liable. Laws of 1890, Chap. 568, § 161. The term "carriage," as used in the statute, includes stage-coaches, wagons, carts, sleighs, sleds and every other carriage or vehicle used for the transportation of persons and goods, or either of them. *Id.* § 162.

² *Moffatt v. Bateman*, 8 L. R. App. 115.

³ *Boniface v. Relyea*, 6 Robt. 397.

⁴ *Bremner v. Williams*, 1 Carr. & Payne, 414; 13 Wend. 611; *Alden v. N. Y. Central R. Co.*, 26 N. Y. 102, considered and explained in *McPadden v. N. Y. Central R. Co.*, 44 N. Y. 478.

⁵ *Ware v. Gay*, 11 Pick. R. 106; *Sharp v. Grey*, 9 Bing. 457; *Ingalls v. Bills*, 9 Met.

Railroad companies are under the same obligation to provide safe and secure cars, with engines and machinery in good order. They are common carriers of passengers, and they are held to the same standard or degree of diligence as carriers by other and older modes of conveyance; with this qualification, that the foresight and vigilance required by the rule must cover the roadway and rails, engines, cars, couplings and other appliances used in the business.¹ They do not actually guarantee the construction or safety of the road and bridges used by them;² and they are answerable for the use of the highest skill and diligence in constructing them, and in keeping them in a safe and suitable condition.³ They do not warrant the absolute safety, soundness and construction of the cars and engines used by them;⁴ and they are bound for the use of the greatest skill and vigilance in their construction, and are liable for any discoverable defects in the material or in the manufacture of them;⁵ they cannot escape liability by showing that they were made by

1; *Farish v. Reigle*, 11 Gratt. (Va.) 697. The same degree of care and watchfulness are not alike requisite to all of the various portions of the machinery and appliances. The apparent necessity for frequency of examination depends somewhat upon the liability to impairment, and the consequences which may be apprehended as the result of defective condition. *Palmer v. D. & H. C. Co.*, 120 N. Y. 170.

¹ 13 N. Y. 9; 19 N. Y. 127; 34 N. Y. 404; 4 Cush., 400; 15 Gratt. (Va.) 230, 236; 56 Barb. 493; 4 Keyes, 108.

² *Toledo, etc., R. R. v. Conroy*, 61 Ill. 162; *Withers v. North Kent R. R.*, 3 H. & N. 969; *Grote v. Chester & H. R. Co.*, 2 Exch. R. 251.

³ *McElroy v. Nashua & Lowell R. Cor.*, 4 Cush. 400; *Virginia Central R. Co. v. Sanger*, 15 Gratt. (Va.) 230, 236; *Brown v. N. Y. Central R. Co.*, 34 N. Y. 404; *Brignoli v. Chicago & Great W. R. Co.*, 4 Daly, 182; *Birmingham v. Rochester City & B. R. R. Co.*, 59 Hun, 583; *Searles v. Kanawha & O. R. R. Co.*, 32 W. Va. 370; *Louisville, etc., R. R. Co. v. Lucas*, 119 Ind. 563; *Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207; *Louisville, etc., R. R. Co. v. Jones*, 83 Ala. 376; and see *Vosburgh v. L. S. & M. S. Ry. Co.*, 94 N. Y. 374. The rule that the carrier must use the "utmost care and diligence" does not mean the utmost care and diligence which men are capable of exercising, but that the carrier must use the utmost care consistent with the carrier's undertaking, and with due regard to all the other matters which ought to be considered in conducting the business. *Dodge v. Boston, etc., Steamship Co.*, 148 Mass. 207.

⁴ *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412; L. R. 4 Q. B. 381; *McPadden v. N. Y. Central R. Co.*, 47 Barb. 247; 44 N. Y. 478; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, 137.

⁵ *Hegeman v. Western R. R. Cor.*, 13 N. Y. 9. Here the court holds the company liable for an injury to a passenger arising from the breaking of an axle in consequence of a latent defect not discernible on an external examination, provided the defect could have been discovered in the process of manufacturing the axle by the use of any test known to men skilled in the business. *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, 137. The case of *Alden v. N. Y. Central R. R. Co.*, 26 N. Y. 102, goes still farther. *Steinweg v. The Erie R. Co.*, 43 N. Y. 123. In this case, and in *Cald-*

a skillful workman; ¹ they must answer for the proper construction and sufficiency of their cars and engines when they purchase them, to the same extent as when they furnish the materials and manufacture these conveyances for their own use.² The rule of diligence covers all the means by which the business of conveying passengers is carried on; it requires that the railway carrier shall use the utmost vigilance, aided by the highest skill, to construct and perfect its road and track, and keep them in a safe condition; and to equip it with cars and engines adequate and sufficient for the safe conveyance of its passengers; and it requires that the carrier shall, in the performance of this duty, use every and all means which existing science furnishes or discloses, to guard against or to remedy defects in the construction or management of its cars and other appliances so as to insure the safety of passengers.³

§ 711. The liability of common carriers for injuries to passengers aris-

well v. New Jersey Steamboat Co., 47 N. Y. 282, where an injury was caused by the explosion of a boiler, the court holds that a carrier of passengers by steam, where a defect in the cars or in the machinery is so apt to prove fatal to human life, is bound to use every precaution which human skill, care and foresight can provide, and to exercise similar care and foresight in ascertaining and adopting new improvements to secure additional protection. Costello v. Syracuse, Binghamton, etc., R. R. Co., 65 Barb. 92.

¹ Sharp v. Grey, 2 Bing. 459; Francis v. Cockrell, L. R. 5 Q. B. 184. But see Grand Rapids, etc., R. R. Co. v. Huntley, 38 Mich. 537. That the carrier is liable for defects in cars of other carriers used on his road to the same extent as if owned by himself, see Pennsylvania Co. v. Roy, 102 U. S. 451; Jones v. N. Y. C. & H. R. R. Co., 28 Hun, 364; 92 N. Y. 628; Gottlieb v. N. Y., L. E. & W. R. R. Co., 100 N. Y. 462; Jetter v. Railroad Co., 2 Abb. Ct. App. Dec. 458; O'Neil v. R. R. Co., 9 Fed. Rep. 337.

² Meier v. Penn. R. R., 64 Penn. St. 225; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Hegeman v. Western R. Cor., 13 N. Y. 9.

³ Idem; Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 137; Costello v. Syracuse, Binghamton, etc., R. R. Co., 65 Barb. 92; Curtis v. Rochester & S. R. R. Co., 20 Barb. 282; S. C. 18 N. Y. 534; Pennsylvania Co. v. Roy, 102 U. S. 451; Kelly v. Manhattan Ry. Co., 112 N. Y. 443. But the rule in relation to the liability of railroad corporations for injuries sustained by passengers through a defect in the road-bed, or in the machinery, or in the construction of the cars, does not apply in full force to injuries received by a passenger on account of the presence of snow and ice on the stairway leading to a station; Kelly v. Manhattan Ry. Co., 112 N. Y. 443; or on the platform of a car; Palmer v. Pennsylvania Co., 111 N. Y. 484; or on account of too great distance between the steps of the cars and the platform; Laffin v. B. & S. W. R. R. Co., 106 N. Y. 136; or on account of the fall of an article placed in the rack over the seat by another passenger; Morris v. N. Y. C. & H. R. R. R. Co., 106 N. Y. 678; or on account of a defective curtain hook on the side of a car; Kelly v. N. Y. & S. Ry. Co., 109 N. Y. 44; or on account of other defective appliances which do not constitute and sustain the operative means of conveyance and transportation. See Palmer v. D. & H. C. Co., 120 N. Y. 170, 177. In all such cases the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended. Kelly v. Manhattan Ry. Co., 112 N. Y. 443.

ing from defects in the cars, coaches or other means used by them is based on the fact of negligence; the same as it is where injury results from some fault or misconduct in the management of the motive power, in the care of the track, or in the adjustment and use of switches.¹

In an action against the carrier by a passenger, for a personal injury, the plaintiff holds the affirmative of the issue, and it is incumbent upon him to establish his cause of action, namely, that he was injured by the defendant's negligence.² And this he may often do, by proving the fact and the manner of the injury; as that the car in which he was riding, moving at a moderate or usual speed, ran off the track and was broken in pieces, injuring him in the wreck;³ or that moving at ordinary speed the train ran off on to a side track, falling into a ditch and injuring the plaintiff;⁴ or that in passing other cars standing on an adjacent track, the plaintiff sitting by the window with her arm on the sill was hit and injured by some board or stick that swept along the side, rubbing and marking the car;⁵ or that the plaintiff was injured by a collision of trains running on the same road and under the defendant's management;⁶ or that the plaintiff was injured by the explosion of a boiler used in the transportation.⁷ There is a reasonable and legal presumption that a train of cars running at reasonable speed may, with the exercise of due

¹ *Carpue v. London & Brighton R. Co.*, 5 Adolph. & Ellis, New Rep. 749; 1 Carr. & Payne, 749; *Skinner v. London, Brighton & S. C. R. Co.*, 5 Exch. 787; *Collett v. London & N. W. R. Co.*, 16 Q. B. 984; 15 Jur. 1053; *Curtis v. Rochester & S. R. Co.*, 20 Barb. 282; S. C. 18 N. Y. 534. An action may be brought on the implied contract. *Bremner v. Williams*, 1 Carr. & P. 414; *Camden & Amboy R. & Tr. Co. v. Burke*, 13 Wend. 611; post, § 713.

² *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Hayes v. Forty-second St., etc., R. Co.*, 97 N. Y. 259. See *Swarthout v. N. J. Steamboat Co.*, 48 N. Y. 209. As to the burden of proof negating contributory negligence, see *Robinson v. N. Y. Central & H. R. R. Co.*, 65 Barb. 146.

³ *Edgerton v. N. Y. & Harlem R. R. Co.*, 35 Barb. 193, 389; S. C. 39 N. Y. 227; *Fietal v. Middlesex R. Co.*, 109 Mass. 398; *Louisville, etc., R. R. Co. v. Smith*, 2 Duvall (Ky.), 556; *Carpue v. London, etc., Ry. Co.*, 5 Q. B. 747; *Mullen v. St. John*, 57 N. Y. 567, 572.

⁴ *Curtis v. Rochester & S. R. R. Co.*, 20 Barb. 282; S. C. 18 N. Y. 534; *Reed v. N. Y. Central R. Co.*, 45 N. Y. 574; 56 Barb. 493.

⁵ *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236; S. C. 16 Barb. 113; 63 Barb. 260; *Chicago & Alton R. Co. v. Pondrom*, 51 Ill. 333.

⁶ *Bridge v. Grand Junction R. Co.*, 3 Mees. & Welsby, 244; *Wylde v. Northern R. R. Co.*, 53 N. Y. 156, 161; *Willis v. Long Island R. Co.*, 34 N. Y. 670; 46 Penn. St. 151.

⁷ *Ill. Central R. Co. v. Phillips*, 49 Ill. 234. Further evidence is often given. 18 N. Y. 209; 58 N. Y. 126. The mere fact that an accident occurred which caused an injury is not generally, of itself, sufficient to authorize an inference of negligence against a defendant. *Dobbins v. Brown*, 119 N. Y. 188.

diligence, be made to keep the track ; that the switches can be properly and securely adjusted ; that the roadway can be kept free from obstruction, with sufficient room on either side ; that by a proper arrangement of the time of arrival and departure from each station, and the employment of suitable agents and servants, collisions may be prevented ; and that explosions may be prevented by the exercise of great skill and care in the construction and management of boilers.¹

§ 712. Negligence, and the requisite evidence to establish the fact according to the plaintiff's allegation, do not properly come within the scope of this work. It is sufficient therefore to touch the subject briefly and only so far as to preserve its relations.

The mere fact that a passenger has sustained an injury while being carried as such does not raise a presumption of negligence against the carrier. But it generally happens that the same evidence which proves the injury done proves also the defendant's negligence ; or shows circumstances from which a strong presumption of negligence arises, and which cast on the defendant the burden of disproving it. Proof that the plaintiff was injured by the overturning of a stage-coach in which he was riding is *prima facie* evidence of the carrier's negligence ;² and is not overcome by proof that the passenger was riding on the outside, after being requested to take an inside seat.³

Proof that the plaintiff was injured by the breaking down of the coach, while moving with ordinary speed, is *prima facie* evidence of negligence in its construction or in its due preparation for the road.⁴ So proof that the plaintiff was injured by the breaking of the axle of the car in which he was riding is sufficient *prima facie* proof of negligence ;⁵ or

¹ Dobbins v. Brown, 119 N. Y. 188. The presumption is acted upon in Illinois Central v. Phillips, 49 Ill. 234. In Swarthout v. N. J. Steamboat Co., 48 N. Y. 209, the plaintiff went into evidence to show a defective construction of the boiler ; 46 Barb. 222 ; and in Carroll v. Staten Island R. R. Co., 58 N. Y. 126, the carrier is held liable for injury by the explosion, unless it is shown that the accident happened without his fault or that of the manufacturer. See Bulkley v. Naumkeag Steam Cotton Co., 24 How. U. S. 386 ; The Bark Edwin, 1 Sprague, 477 ; The Mohawk, 8 Wall. 153.

² McKinney v. Neil, 1 McLean, 540 ; Farish v. Reigle, 11 Gratt. (Va.) 697 ; Fairchild v. California Stage Co., 13 Cal. 599 ; 25 Cal. 460 ; McLean v. Burbank, 11 Minn. 277 ; Lemon v. Chancellor, 68 Mo. 340.

³ Keith v. Pinkham, 43 Maine, 501 ; 34 N. Y. 670.

⁴ Curtis v. Drinkwater, 2 Barn & Ald. 169 ; Christie v. Griggs, 2 Campb. 79 ; 13 N. Y. 9 ; Ware v. Gay, 11 Pick. 106.

⁵ Hegeman v. Western R. Cor., 13 N. Y. 9. The same presumption attaches where the spreading of a coupling link causes a train to separate, whereby a person is injured. Griffin v. Boston & A. R. R. Co., 148 Mass. 143. In some of the States statutes have been enacted imposing upon railroad companies, after proof of injury, the burden of showing the exercise of proper care.

proof that cattle were allowed to come upon the track, and that the engine struck a cow killing it, detaching the car in which plaintiff rode and casting it over down the bank; ¹ proof of the injury, with the circumstances attending it, in cases like these, will generally establish the plaintiff's cause of action, unless the defendant meets the case by showing that the injury occurred without any fault or negligence on his part.

§ 713. A railroad carrier's duty to keep the track in a safe condition for the passage of trains does not render the company liable for the criminal act of a stranger, in drawing the spikes and loosening a rail of the road, shortly before the passing of a train, where no failure in diligence is attributable to the officers and agents of the road.² The carrier cannot guard against an act of this kind, and is not held liable for the resulting injury.³ For the same reason, a company that guards its track with due diligence is not liable for an injury resulting from the breaking of a rail by severe frost; ⁴ or for any act of superior force that cannot be anticipated or guarded against. The natural action of heat, causing an expansion of the rails, will not excuse the company where it appears that the track may be laid and used in such a manner as to avoid danger from that cause.⁵

§ 714. The carrier's failure to fulfill a duty imposed upon him by statute or by common law renders him liable, when his neglect results in an injury to his passenger. But a statute requiring additional safeguards for the protection of passengers does not limit or modify his common law liability; ⁶ while it does increase his liability according to its terms.⁷

A railroad is not required by the common law to fence its roadway to prevent the intrusion of cattle; ⁸ and yet the presence of cattle on the track increases the danger of the journey along the road, and is often treated as one of the circumstances tending to establish the fact of negligence in the carrier; as calling for diligence on the part of the road to prevent the cattle from coming upon the track, or such a dimi-

¹ *Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408; *Brown v. N. Y. Central R. Co.*, 34 N. Y. 404.

² *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9. Negligence in leaving the track in an unsafe condition will render the carrier liable. *Read v. Spaulding*, 5 Bosw. 395; 30 N. Y. 564, 630.

³ *Keeley v. Erie R. Co.*, 47 How. Pr. 256, a malicious misplacement of a switch.

⁴ *McPadden v. N. Y. Central R. Co.*, 44 N. Y. 478.

⁵ *Reed v. N. Y. Central Co.*, 56 Barb. 493.

⁶ *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282.

⁷ *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 139.

⁸ *Tonawanda R. v. Munger*, 4 N. Y. 349; *Railroad v. Skinner*, 19 Penn. St. 301; *Toledo R. R. v. Vickery*, 44 Ill. 76; *Perkins v. Railroad*, 29 Maine, 307.

nution of speed as may prevent a collision, with its consequent injury to passengers.¹ And while the duty of the railroad company to erect fences along the road, and cattle guards at the crossings, imposed by statute, appears to have been designed primarily for the protection of the general public and adjacent owners, there does not appear to be any good reason depriving a person riding as a passenger on the road of the right to insist upon that additional safeguard; ² especially where there is no limitation in the terms of the statute. This interpretation of the statute has been countenanced by eminent judges; ³ and the duty thus imposed is only a specification of one out of many embraced in the broad rule of the common law.⁴

§ 715. By a course of logical development our courts are steadily deducing specific duties from the carrier's general duty to exercise the utmost care and the greatest foresight to insure the safety and convenience of passengers. The specific duties spring out of the general duty, as branches out of the stem of a tree.

Railroad carriers publishing a time-table, indicating the time of the starting of trains from the depots and stations along the road, are bound to use all due and reasonable care and effort to keep their engagement thus made with the public; and they must use the same care to notify the public of any change made in the time for the starting of trains.⁵ They are also bound to use like reasonable care and effort to complete the trip within the specified time; and are liable in damages, on the ground of negligence, for a failure in this respect.⁶

Railway carriers are bound to announce the starting of a passenger

¹ *Brown v. N. Y. Central R. Co.*, 34 N. Y. 404.

² 2 R. S. of N. Y. 689, 690, §§ 55, 56, cited by Judge PECKHAM, in 34 N. Y. 408; *Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408. For the corresponding provisions under the present railroad law, see Laws of 1890, Chap. 565, § 32, as amended by Chap. 367 of Laws of 1891, and Chap. 676 of Laws of 1892. The road owes a different duty to a citizen crossing its track from that which it owes to a passenger. *Beiseigel v. N. Y. Central R. Co.*, 40 N. Y. 9; *Griffen v. N. Y. Central R. Co.*, 40 N. Y. 34; 8 Barb. 358, 390; *Poler v. N. Y. Central R. Co.*, 16 N. Y. 476.

³ *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; *Staats v. Hudson River R. Co.*, 3 Keyes, 196; *Tallman v. Syracuse, B. & N. Y. R. Co.*, 4 Keyes, 128.

⁴ *Brace v. N. Y. Central R. Co.*, 27 N. Y. 269; *Shepard v. Buffalo, N. Y. & Erie R. Co.*, 35 N. Y. 641. The statute in Vermont is held to bind the roads only in favor of adjoining owners, not in favor of trespassers. *Bemis v. C. & P. R. R.*, 42 Vt. 375.

⁵ *Sears v. Eastern R. R. Co.*, 14 Allen, 433; *Denton v. Great Northern R. Co.*, 5 Ellis & Bl. 860; *Gordon v. M. & L. R. R.* 52 N. H. 596.

⁶ *Weed v. Panama R. R. Co.*, 17 N. Y. 362; *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48.

train, or give notice of it by some suitable signal.¹ They are bound to give passengers the opportunity to get on board and take seats before the train moves. It is their duty to use every reasonable precaution in receiving passengers, and in starting the train.²

It is also the duty of the railroad carrier to announce the stations along the road as the train draws near to them, and come to a stop by the platform or at a safe and suitable place for the passengers to leave the cars; and this announcement as the train comes to a halt is equivalent to an invitation to the passengers to step off the cars;³ for which purpose a reasonable time must be given.⁴

Stopping for a space at a way station, to await the coming of a belated train, the carrier must give through passengers who are within reach reasonable notice to get on board; the engineer or conductor must give the usual signal, and use all reasonable diligence to recall passengers to their seats in the cars. The custom, including the whistle and the call, indicates the admitted duty and the proper mode of discharging it.⁵

§ 716. The law does not enable a party to recover damages for an injury resulting in part from his own negligence, or where his own

¹ *Keating v. N. Y. Central R. Co.*, 3 Lansing, 469; S. C. 49 N. Y. 673. The decision assumes that passengers are to get on at the depot or station, at the place prepared and used for that purpose.

² *Curtis v. R. R.*, 27 Wis. 158; *Geddes v. R. R. Co.*, 103 Mass. 391; *Brien v. Bennett*, 8 Carr. & P. 724.

³ *Columbus & Indianapolis Central R. R.*, 31 Ind. 408; *Southern R. R. v. Kendrick*, 40 Miss. 374; *Nichols v. R. R.*, 7 Irish L. T. 58; *Lewis v. R. R. L. R.*, 9 Q. B. 70; *Dickens v. N. Y. Central R. Co.*, 1 Keyes, 23; 23 N. Y. 158; *Central R. R. Co. v. Thompson*, 76 Ga. 770.

⁴ *Penn. R. R. v. Kilgore*, 32 Penn. St. 292; *T. W. & W. R. R. v. Baddeby*, 54 Ill. 19; *Louisville, N. O., etc., R. R. Co. v. Mask*, 64 Miss. 738. It is culpable negligence on the part of a railroad corporation for its officers to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes him not to stop the train entirely and give the passenger ample time and opportunity to alight. *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 51; *Bucher v. N. Y. C. & H. R. R. R. Co.*, 98 N. Y. 128. It is parcel of the carrier's implied contract that he will notify passengers when to alight, as the train comes to a station; and it is an act of negligence in a passenger to alight before such announcement is made. *Taber v. Del., Lack. & W. R. R. Co.*, 4 Hun, 765; 71 N. Y. 489; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Hayes v. Gallagher*, 72 Penn. St. 136. It is also the carrier's duty to give passengers a reasonable time to alight; *Burrows v. Erie R. Co.*, 3 T. & C. 44; and to bring the train to a rest, and avoid sudden starts or jerks, while the passengers are moving out of the cars. *Milliman v. N. Y. Central & Hudson River R. R. Co.*, 6 T. & C. 585; S. C. 66 N. Y. 642; *Sauter v. N. Y. Central & Hudson R. R. Co.*, 6 Hun, 446; 66 N. Y. 50.

⁵ *State v. G. T. R. R. Co.*, 58 Maine, 176.

negligence contributes to the injury.¹ The principle is one of general application. The common law does not undertake in such cases to divide and apportion the damages, or to impose damages in proportion to the fault or negligence of each party. Hence a passenger has no cause of action where he is injured through, or in consequence of, his own negligence;² or is guilty of contributory negligence.³

What is contributory negligence? In a passenger, it is a want of ordinary care existing at the time of the injury, and having some connection with it; it is an act of negligence proximately contributing to the injury complained of.⁴ He cannot recover when his negligence co-operates with that of the carrier in causing the injury; and he can recover where he exercises ordinary care and is injured by the carrier's negligence.⁵

§ 717. By a statute of this State, if a passenger is injured on any railroad while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of the passenger cars, the company is not liable for the injury; provided they have at the time furnished room inside the passenger cars sufficient for the proper accommodation of the passengers.⁶ Independent of the statute, it is not negligence in a passenger to stand upon the platform, or to ride in a baggage car; and the statute does not apply where the company fail to furnish sufficient accommodations within the cars.⁷ The statute applies when an injury results from a passenger's being on the platform or in a baggage car; and it does not apply where an injury results from a collision, occasioned by the carrier's gross negligence,

¹ *Baxter v. Troy & Boston R. Co.*, 41 N. Y. 502; *Wilcox v. Rome & Watertown R.*, 39 N. Y. 358.

² *Van Schaick v. Hudson River R. Co.*, 43 N. Y. 527.

³ *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230.

⁴ *Button v. Hudson River R. Co.*, 18 N. Y. 248, and cases there cited. See *Austin v. N. J. Steamboat Co.*, 43 N. Y. 75.

⁵ The right to recover is not established by showing that the defendant was guilty of greater negligence than the plaintiff—it is not a question of comparative negligence. *Bernhardt v. R. & S. Railroad Co.*, 32 Barb. 165; *McGrath v. Hudson River R. Co.*, 32 Barb. 144. See *Castle v. Duryea*, 32 Barb. 480. As to the degree or kind of care called for by circumstances, affirming the general rule, see *O'Keefe v. Chicago & R. I., etc., R. R.*, 32 Iowa, 467. In favor of the comparative rule, see *C. & N. W. R. R. Co. v. Sweeney*, 52 Ill. 330; and *Chicago, B. & Q. R. v. Gregory*, 58 Ill. 272.

⁶ N. Y. Laws of 1890, Chap. 565, § 53, as amended by Laws of 1892, Chap. 676. The fact that the conductor does not object to a passenger's standing on the platform cannot be taken as an implied waiver of the protection given by the statute. *Higgins v. N. Y. & Harlem R. Co.*, 2 Bosw. 132.

⁷ *Willis v. Long Island R. Co.*, 32 Barb. 398; 34 N. Y. 670; *Nolan v. Brooklyn City & Newtown R. R. Co.*, 87 N. Y. 63. It is the duty of a railroad carrier to furnish

and in no way attributable to the circumstance of the passenger's being out of his place on the train; as where a passenger was in the baggage car, with the conductor's assent, at the time of the collision.¹

Aside from the statute, a railroad company may insist that passengers shall ride in the cars,² and thus throw upon those disobeying the regulation the risk of riding in a place of so much exposure as the platform between the cars—the specific risks incident to that position.³ But where the company makes no such regulation, and the conductor tacitly permits passengers to stand upon the platform, or pass from car to car to secure a seat while the train is moving, they are not chargeable with negligence; on ordinary railroads,⁴ or on street cars.⁵

A passenger who unnecessarily, and of his own choice, rides on the steps of a car or remains on the edge of the platform, cannot recover damages for injuries received in consequence of such voluntary exposure. He cannot recover where the injury results in part from his failure to exercise reasonable prudence.⁶

§ 718. A passenger is bound to use ordinary care and prudence in getting aboard of the train and in alighting from it. He does not exercise reasonable prudence when he attempts to get on the platform of a car crowded with people, while the train is moving;⁷ and he is not

each passenger with a seat. *Thorp v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402. But if the carrier fails to perform this duty, it does not justify a passenger in refusing to leave the platform and to go inside the car when requested by a person in charge of the train. *Granville v. Manhattan R. R. Co.*, 105 N. Y. 525. See *Louisville, etc., R. R. Co. v. Kelly*, 92 Ind. 371. Whether the statute applies to street railroads does not seem to be decided. *Hays v. Forty-second St., etc., R. R. Co.*, 97 N. Y. 259. The statute does not apply to a passenger passing from one car to another. *Costikyan v. R., W. & O. R. R. Co.*, 58 Hun, 590; 128 N. Y. 633.

¹ *Carroll v. N. Y. & New Haven R. Co.*, 1 Duer, 571, and cases there cited; approved in 34 N. Y. 670, and in *Halsey v. Earle*, 30 N. Y. 208; *Colegrove v. N. Y. & N. H. and N. Y. & Harlem R. Co.*, 29 N. Y. 492.

² *Granville v. Manhattan R. R. Co.*, 105 N. Y. 525.

³ *Merrell v. Lynn R. Co.*, 8 Allen, 234; *Quinn v. I. C. R. R. Co.*, 51 Ill. 495; *Camden & Atlantic R. R. Co. v. Hoosey*, 99 Pa. St. 492.

⁴ *McIntyre v. N. Y. Central R. Co.*, 38 N. Y. 287; 43 Barb. 532. See *Marquette v. Chicago & N. W. R. Co.*, 33 Iowa, 563; 15 Ill. 468; *Downs v. N. Y. Central R.*, 47 N. Y. 83.

⁵ *Wilton v. Middlesex R.*, 107 Mass. 108; *Burns v. Bellefont R.*, 50 Mo. 139; *Seigel v. Eisen*, 41 Cal. 109; *Sheridan v. Brooklyn R. Co.*, 36 N. Y. 39.

⁶ *Quinn v. I. C. R. Co.*, 51 Ill. 495; *Ward v. Central Park, etc., R. R. Co.*, 11 Abbott Pr. N. S. 411; 42 How. Pr. 289. A passenger is not chargeable with negligence where he rides on the platform of a street car, on account of the crowded condition of the car. *Clark v. Eight Ave. R. R. Co.*, 36 N. Y. 135.

⁷ *Phillips v. Rensselaer & Saratoga R. Co.*, 57 Barb. 644; *S. C.*, 49 N. Y. 177; *Illinois Central R. Co. v. Slatton*, 54 Ill. 133. It is not an absolute bar to a recovery that the plaintiff was injured while attempting to board a moving train. The act is not

free from blame where he attempts to alight from a car before it comes to a stop.¹ He is bound to conform to the regulations of the company, in respect to place and manner of getting on and off; and when he disregards the rule of the company and gets on or off while the car is in motion, he is fairly chargeable with negligence.² A desire to get off, so as not to be carried beyond the station, does not justify a passenger in leaping from a car while the train is moving.³

A passenger riding on a street car may rise for the purpose of alighting, and without negligence move to the platform or step of the car, while it is yet in motion; * and the car being at a stand, he has a right to rise, requesting the driver to keep his brake, for the purpose of alighting; and it is negligence on the part of the company to start the car before he has time to step off.⁵ It being the conductor's duty to stop only where it is prudent to do so, a passenger is not in fault who moves to the platform on the conductor's suggestion, where he is injured by a collision with an approaching truck.⁶ So, in getting on a street car, it is not as a matter of law negligence in a passenger to enter by the front platform on the driver's request, where the car is at rest or on the point of coming to a rest.⁷

§ 719. A passenger has the right to go out upon the platform of a railroad car drawn by steam, in order to escape from danger to his life

negligent in itself. The speed of the train is to be considered, in connection with the conduct of the train servants and the age and activity of the traveler, before his action can be characterized as negligent. *Eppendorf v. B. C. & N. R. R. Co.*, 69 N. Y. 195; *Hunter v. C. & S. V. R. R. Co.*, 112 N. Y. 371. But under ordinary circumstances a person who attempts to board a train moving at a rate of from four to six miles an hour is chargeable with negligence as a matter of law, notwithstanding that he was told by the conductor, if he was going on the train, to jump on. *Hunter v. C. & S. V. R. R. Co.*, 112 N. Y. 371; *Solomon v. Manhattan Ry. Co.*, 103 N. Y. 437.

¹ *Nichols v. Middlesex R. R.*, 106 Mass. 463; *Railroad Co. v. Aspell*, 23 Penn. St. 147. It is not under all circumstances, and as a matter of law, an act of negligence for a passenger to attempt to alight from a moving train. *Raben v. Cent. I. R. R. Co.*, 74 Iowa, 732; *Louisville, etc., R. R. Co. v. Stacker*, 86 Tenn. 343; *St. Louis, I. M. & S. R. R. Co. v. Person*, 49 Ark. 182.

² *Lewis v. Baltimore & O. R. R.*, 38 Md. 588; *Hickey v. Boston & Lowell R. Co.*, 14 Allen, 429; *Johnson v. W. C. & R. R. Co.*, 70 Penn. St., 357; *Knight v. Pontchartrain R. R.*, 23 La. Ann. 462.

³ *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Illinois Central R. Co. v. Slatton*, 54 Ill. 133; *Morrison v. Erie R. Co.*, 56 N. Y. 302.

⁴ *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131. See *Railroad Co. v. Pollard*, 22 Wall. 341; *Wood v. L. S. & M. S. Ry. Co.*, 49 Mich. 320.

⁵ *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370. See *Chicago West Division Ry. Co. v. Mills*, 105 Ill. 63.

⁶ *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378.

⁷ *Maher v. Central Park, etc., R. R. Co.*, 7 Jones & Spen. 155.

and limbs arising from the unskillfulness and negligence of the company and its servants.¹ He is not chargeable with contributory negligence in thus attempting to leap from the car, to escape the imminent danger of a collision. He is bound to act with reasonable discretion; and he is not bound to repress the instinct of self-preservation, and sit still and take the chances. He is justified in seeking to escape injury, by leaving the car.² For the same reason, where a passenger is by the wrongful act of the company put to an election between leaving the car while the train is moving slowly, and being carried beyond the station where he designs to stop, and is injured while getting off on the suggestion of a servant of the road, he is not chargeable with negligence.³

Acting on the advice of a servant of the company and compelled to act promptly, a passenger is not held to the same degree of prudence as he may be where he has time for deliberation and there is nothing to bias his judgment. Such advice, under the circumstances, operates as a kind of constraint; and it would be unreasonable to hold him chargeable with negligence as a matter of law, in favor of the company. It is to be passed upon rather as a question of fact, whether under the circumstances the passenger acted with reasonable prudence.⁴

§ 720. It has been thought that a passenger riding in a stage or on a train of cars, having not the least control over the movement of the conveyance, is so far identified with his carrier that he cannot recover against a third party damages for an injury resulting in part from his carrier's negligence; on the ground that the negligent management of the train or stage is attributable or imputable to him. And he certainly cannot recover without showing that he was injured by the negligence of the defendant as one of the co-operating causes.⁵ If he establishes

¹ *Eldridge v. Long Island R. Co.*, 1 Sandf. 89; *Mitchell v. Southern Pacific R. R. Co.*, 87 Cal. 62.

² *Buel v. N. Y. Central R. Co.*, 31 N. Y. 314; *Hazman v. Hoboken L. & I. Co.*, 2 Daly, 130; 57 Barb. 560; *Caswell v. Boston & Worcester R.*, 98 Mass. 194; *Twomley v. C. P. N. & E. R. R. Co.*, 69 N. Y. 158. See *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228.

³ *Filer v. New York Central R. Co.*, 49 N. Y. 47; *Penn. R. R. Co. v. Kilgore*, 32 Penn. St. 292; *Liner v. G. W. R. Co.*, L. R. 3 Exch. 150.

⁴ *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47, and cases there commented upon by ALLEN, J.; *Foy v. L. & So. R. R. Co.*, 18 Com. Bench, N. S. 225; *Lent v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 467; *Bucher v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 128. Negligence is a question of law where the facts are undisputed. *Morrison v. Erie Ry. Co.*, 56 N. Y. 302.

⁵ *Thoroughgood v. Bryan*, 8 C. B. 115; *Catlin v. Hills*, 8 C. B. 123; *Smith v. Smith*, 2 Pick. 621; *Cleveland R. R. v. Terry*, 8 Ohio St. 570; *Lockhardt v. Lichtenthaler*, 46 Penn. St. 151.

that fact, he may recover. The law does not impute to him the negligence of his carrier.¹ Being injured by a collision resulting from the negligence of his carrier's servant and that of another company, he may recover against both, or against either.¹

On the other hand, the care of an infant of tender years belongs of right to his parents or guardian; and the negligence of a parent exposing a child to injury is attributed to the child, when he brings an action to recover damages for the injury. The conduct and movements of the child, as a passenger, are under the guidance and control of the parent, lawfully and rightfully; the child is not *sui juris*, it has no capacity or right of self-direction, and often no physical power to act for itself.² An insane man, incapable of taking proper care of himself, falls under the same rule; the neglect of his guardian is attributed to him, when he brings an action for a personal injury arising in part from the want of due guardianship.³ The doctrine has given rise to some debate.⁴ And it appears to be settled that a sick or aged person, a delicate woman, a lame man or a child is entitled to more attention and care from a railroad company than one in good health and under no disability. As they must now and then travel, they are entitled to some indulgence, precisely on account of their weakness or infirmity; *e. g.*, they are entitled to more time in which to get on or off the cars, or to cross the street.⁵ Being *sui*

¹ Webster v. Hudson River R. Co., 38 N. Y. 260; Sheridan v. Brooklyn & N. R. Co., 36 N. Y. 39; Chapman v. N. H. R. Co., 19 N. Y. 341; Colegrove v. Harlem & N. H. R. Co., 20 N. Y. 592; 32 N. Y. 597; Bennett v. N. J. R. & T. Co., 36 N. J. L. 225; N. Y., L. E. & W. R. R. Co. v. Steinbrenner, 47 N. J. L. 161; Transfer Co. v. Kelly, 38 Ohio St. 86; Wabash, etc., R. R. Co. v. Schacklet, 105 Ill. 364; Little v. Hackett, 116 U. S. 366; McCallum v. Long Island R. R. Co., 38 Hun, 569. The same rule is held where a person is riding in another's wagon. Robinson v. N. Y. Central & Hudson R. R. Co., 65 Barb. 146; S. C. 66 N. Y. 11; Hoag v. N. Y. C. & H. R. R. R. Co., 111 N. Y. 199; Masterson v. N. Y. C. & H. R. R. R. Co., 84 N. Y. 247; Dyer v. Erie Ry. Co., 71 N. Y. 228; Phillips v. N. Y. C. & H. R. R. Co., 127 N. Y. 657. See Brickell v. N. Y. C. & H. R. R. Co., 120 N. Y. 290.

² Morrison v. Erie R. Co., 56 N. Y. 302; Downs v. N. Y. Central R. Co., 47 N. Y. 83. These cases assume the principle as applicable to an infant carried as a passenger. Waite v. N. E. Railw. Co., E. B. & E. 719. Where the child has done no negligent act, the negligence of the parent will not defeat a recovery by the child. McGarry v. Loomis, 63 N. Y. 104; Ihl v. Forty-second St., etc., R. R. Co., 47 N. Y. 317. And the negligence of a child not *sui juris* will not defeat a recovery without concurring negligence on the part of the parents or guardians. Kunz v. City of Troy, 104 N. Y. 344.

³ Willets v. Buffalo & Rochester R. Co., 14 Barb. 585.

⁴ American Law Review, 405, April No. of 1870; Honegsberger v. Second Ave. R. Co., 1 Keyes, 570; 65 Barb. 92; Thurber v. Harlem, B. M. & F. R. Co., 60 N. Y. 326.

⁵ Thurber v. Harlem, B. M. & F. R. Co., 60 N. Y. 326, 336; Sheridan v. Brooklyn & Newtown R. R., 36 N. Y. 39; Railroad Co. v. Stout, 17 Wall. 657. A person of

juris, the law demands of infants such care as they are capable of under the circumstances.

§ 721. Negligence is not to be presumed in the plaintiff or in the defendant. Hence the burden of proving contributory negligence rests with the defendant, where the plaintiff has established his cause of action without disclosing any facts implicating him in the negligence causing the injury.¹ And hence also the plaintiff must exculpate himself where the proof discloses want of care on his part. He must establish his cause of action; and negligence by the defendant, with ordinary care by the plaintiff, is necessary to sustain the action.² And so it happens that in some cases the plaintiff must show affirmatively that he acted with reasonable care, besides proving the defendant's negligence.³

Negligence on the part of an infant plaintiff is generally treated as a matter of fact to be found by a jury. Contributory negligence by the parents of a very young child does not defeat a recovery against a railroad company for running over and injuring it, where it appears that the engine driver might have stopped the engine and prevented the injury with the exercise of ordinary care.⁴ On the other hand,

defective sight is bound to use what senses he has; *Gonzales v. N. Y. & Harlem R. Co.*, 38 N. Y. 440; 1 *Jones & Spen.* 57; a cripple was treated with some consideration on that account in *Colt v. Sixth Ave. R. Co.*, 1 *Jones & Spen.* 189; a lad on account of his infancy, in *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; and in *Costello v. Syracuse & R. R. Co.*, 65 Barb. 92; and in *Mangum v. Brooklyn R. Co.*, 38 N. Y. 455, the court shows some reluctance to attribute to the infant the parent's negligence; *Ihl v. Forty-second St., etc., R. R. Co.*, 47 N. Y. 317; *Lynch v. Smith*, 104 Mass. 52; 58 Ill. 226; *Railroad Co. v. Mahoney*, 57 Penn. St. 157; *B. & I. R. R. Co. v. Snyder*, 18 Ohio St. 414. The tendency of these cases is to qualify the doctrine of *Hartfield v. Roper*, 21 Wend. 615.

¹ *Robinson v. N. Y. Central & Hudson River R. Co.*, 65 Barb. 146; *Hackford v. N. Y. Central R. Co.*, 43 How. Pr. 222. These cases are not in conflict with *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; or with *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. Rep. 3 Otto, 291.

² *Harlow v. Humiston*, 6 Cow. 189; *Butterfield v. Forrester*, 11 East, 60; *Rathbun v. Payne*, 19 Wend. 399.

³ The burden of showing freedom from contributory negligence rests upon the plaintiff. The absence of such negligence may be established from inferences which may properly be drawn from the surrounding facts and circumstances. But such inference cannot be drawn from a presumption that a person will exercise care and prudence in regard to his own life and safety. And where the circumstances point as much to the negligence of the person injured as to its absence, or point in neither direction, the plaintiff must be nonsuited. *Wiwrowski v. L. S. & M. S. R. Co.*, 124 N. Y. 420; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290.

⁴ *Kenyon v. N. Y. Central & Hudson R. R. Co.*, 5 Hun, 479, and cases there cited; *Mangum v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Darley v. Norwich R. Co.*, 26 Conn. 591; *Ihl v. Forty-second St. R. R. Co.*, 47 N. Y. 317; *Green v. Erie Ry. Co.*, 11 Hun,

contributory negligence by a child of sufficient age to travel by himself will defeat his action when he fails to exercise that degree of care and prudence which may be reasonably expected from him.¹

§ 722. A railroad company which continues to use a defective and dangerous locomotive engine, after notice of its dangerous condition, is liable even to one of its servants engaged in running the engine for an injury sustained by him in consequence of the defects, without negligence on his part.² This liability is placed upon the ground that the master is liable for his own negligence to his servant; and that this negligence may consist in the employment of unfit and incompetent servants and agents, or in the furnishing for the work to be done, or for the use of the servant, machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied.³ The employment of an intemperate or unskillful workman, or the retention of him, with knowledge, renders the master liable to a servant who is injured through the negligence or unskillfulness of the incompetent man.⁴ As the liability rests on the ground of negligence in the employer, he is not held liable, as for a defective structure, where he does his best to employ competent men to perform and supervise the work.⁵ The workmen being properly chosen, the master is not liable to one of them for the negligence of the other;⁶ and yet may be held liable where his own negligence combines with that of his servants to produce the injury. *E. g.*, a railroad company is guilty of negligence in not sending out with a train a sufficient number of brakemen, and is liable to a servant on another train for a personal injury resulting therefrom and from the negligence of co-servants.⁷

333. Such cases are exceptions to the rule that a party in an action against another to recover damages for an injury alleged to have been caused by the negligence of the latter must fail unless he proves that the negligence alleged caused the injury. *Cosgrove v. N. Y. C. & H. R. R. Co.*, 13 Hun, 329, 331.

¹ *Thurber v. Harlem, B. M. & F. R. R. Co.*, 60 N. Y. 326; *McMahon v. Mayor, etc., of New York*, 33 N. Y. 642; *Honesberger v. Second Ave. R. R. Co.*, 1 Keyes, 570; *Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308, and cases cited.

² *Keegan v. The Western R. R. Co.*, 8 N. Y. 175; *Coon v. Syracuse & Utica R. Co.*, 5 N. Y. 492; *Farwell v. B. & W. R. R. Co.*, 4 Met. 49.

³ *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562; *Priestly v. Fowler*, 3 M. & W. 1; *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548; *Plank v. N. Y. Central & Hudson R. R. Co.*, 60 N. Y. 607.

⁴ *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521.

⁵ *Warner v. Erie R. Co.*, 39 N. Y. 468; *Hard v. Vermont Central R. Co.*, 32 Vt. 473. See also, *Gibson v. Erie R. Co.*, 63 N. Y. 449.

⁶ *Hofnagle v. N. Y. Central & Hudson R. R. Co.*, 55 N. Y. 608; *Haskins v. N. Y. C. & H. R. R. Co.*, 65 Barb. 129.

⁷ *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549; *Sprong v. Same Co.*, 58 N. Y. 56.

§ 723. The responsibility of the carrier for the safe conveyance of passengers is the same, whether the work is done by him personally or by his servants and agents. His own obligation is the measure of the diligence and circumspection and foresight demanded of those who are engaged in his employment. The act or neglect of the servant is that of the principal, who engages to assume and answer for it as his own; and it is immaterial whether the agent be in fact incompetent, or, being competent, proves himself negligent in performing the duties of his place.¹ If he be an intemperate man or otherwise untrustworthy his employer is answerable for any injury that may result from his misconduct; for it is a great neglect of duty in the carrier of passengers to entrust to such a person any responsibility for human life.²

It follows from the general rule of liability already stated, and it has been distinctly adjudged, that the carrier of passengers is answerable for any injury resulting from rash and furious driving, racing or other reckless conduct in the conveyance of passengers.³ Merely fast driving is not of itself evidence of misconduct; but the least degree of imprudence or want of care in the driver renders his employers liable; and where a collision or other accident occurs while the driver is engaged in a race or trial of speed, the carrier is responsible in exemplary damages.⁴

The same principle applies to a railroad carrier. The company is liable to a passenger for the reckless conduct of an engineer in driving a train of cars with speed against obstructions upon the track in broad daylight;⁵ they are liable for his rashness in driving a train with improper speed over a defective track, or for running out of time on a track on which a train is due coming from an opposite direction.⁶

¹ Ante, § 710; *Williams v. Vanderbilt*, 28 N. Y. 217; *Roberts v. Johnson*, 58 N. Y. 613.

² *Stokes v. Saltonstall*, 13 Peters, 181; *Eldridge v. Long Island R.*, 1 Sandf. 89. The employment of an intemperate driver by a carrier is prohibited by Laws of 1890, Chap. 568, §§ 158, 159.

³ *Peck v. Neil*, 3 McLean C. C. 22; *Monroe v. Leach*, 7 Met. 274; *Churchill v. Rosebeck*, 15 Conn. 359; *Mayor v. Humphries*, 1 Carr. & P. 251; *Gough v. Bryan*, 5 Dowl. P. C. 765; *Claffin v. Wilcox*, 18 Vt. 605. Laws of 1890, Chap. 568, § 161.

⁴ *Peck v. Neil*, supra, and cases above cited. A person driving any vehicle upon any plank road, turnpike or public highway who unjustifiably runs the horses drawing the same, or causes or permits them to run, is guilty of a misdemeanor. Penal Code, § 666.

⁵ *Willis v. Long Island R. Co.*, 34 N. Y. 670, 675.

⁶ *Buel v. N. Y. Central R. Co.*, 31 N. Y. 314; *Carpue v. Brighton R.*, 5 Q. B. 747; *Farwell v. Boston R.*, 4 Met. 49. The carrier is also liable for an injury caused by the sudden backing of a train, while a passenger is attempting to get off; and cannot escape liability by showing that the passenger was intoxicated. *Millman v. N. Y. C. & H. R. Co.*, 66 N. Y. 642.

§ 724. *Law of the Road.* It is the duty of the carrier of passengers, as well as of all other travelers upon the highways, to observe the established usage or law of the road in passing other teams and vehicles. In England the custom is to keep to the left in passing; in this country the rule is reversed, each party keeping to the right.¹ But the rule is not so invariable as to require the traveler in all cases to keep exactly to the right; if a carriage coming in any direction leave sufficient room for any other carriage, horse or passenger on their proper side of the way, it is a sufficient compliance with the law of the road.² Where the road is clear, the driver may go on what part of the road he thinks fit, and is not chargeable with the consequences, though by reason of his horses taking fright an injury is caused to a third person which might not have happened if he had been on the right side of the road.³

Under our statutes, wherever any persons, traveling with any carriages or other conveyances, shall meet on any turnpike road or public highway in this State, the persons so meeting shall seasonably turn their carriages to the right of the center of the road, so as to permit such carriages to pass without interference or interruption, under a penalty for every neglect or offense, to be recovered by the party injured.⁴ On a question arising under this act, it was adjudged that by a sound construction of it the parties are to keep to the right of the center of the road, although it may be more difficult for one party to turn out than the other; the act was designed to settle and establish the rights of travelers in such a manner that there can be no mistake about them; and it does establish, upon consideration of public policy, a broad, general rule, which is strictly enforced, although sometimes it may operate inconveniently upon parties. It is not the center of the smooth or most traveled part of the road which is the dividing line, but the center of the worked part, although the whole of the smooth or most traveled path may be upon one side of that center, unless the situation of the road is such that it is impracticable or extremely difficult for the party to turn out.⁵

A traveler on horseback, meeting another horseman or vehicle on a public highway, is not required to turn out in any particular direction; °

¹ Story on Bailm. § 599; Kennard v. Burton, 25 Maine R. 39; Laws of 1890, Chap. 568, § 157. ² Wordsworth v. Willan and others, 5 Esp. R. 273.

³ Aston v. Heaven, 2 Esp. R. 533; Foster v. Goddard, 40 Maine, 64.

⁴ Laws of 1890, Chap. 568, § 157.

⁵ Earing v. Lansing, 7 Wend. R. 185; Johnson v. Small, 5 B. Mon. 25; Burdick v. Worrall, 4 Barb. 596. The rule is qualified when a road is covered with deep snow. Smith v. Dygert, 12 Barb. 613.

⁶ Dudley v. Bolles, 24 Wend. R. 465. The owner of the adjoining land may occupy that part of the sides of the road not subject to the right of way. 6 Cowen R. 189.

all that is required is prudent care under existing circumstances. In England, on the contrary, it is adjudged that the rule of the road as to keeping the proper side applies to saddle horses as well as to carriages; and where a carriage and horse are to pass, the carriage must keep its proper side, and so must the horse. If, however, the driver of a carriage is on his proper side, and sees a horse coming furiously on the wrong side of the road, it is the duty of the driver of the carriage to give way and avoid an accident, although in so doing he goes a little on what would otherwise be his wrong side of the road.¹

§ 725. When a traveler deviates from the rule of the road, he is bound to use a greater degree of care and caution, and keep a more watchful lookout to avoid coming in contact with other vehicles, than is necessary when he remains on the right side of the road.² And so where parties on the road meet on a sudden, and a collision ensues, the party on the wrong side must answer for the damages, unless the other has been deficient in the exercise of ordinary care; ³ and his failure to adopt on the instant the best means of avoiding a collision is not considered want of ordinary care in a party driving on the right side.

The circumstances are to be considered in the application of the rule. Parties driving along a road in the night time must on that account observe the rule with care; ⁴ while a party driving along the highway in the day time, with a heavy load, is not so strictly bound, when he meets a light wagon where there is plenty of room.⁵ So on the crowded streets of a city, situations and circumstances frequently arise where the driver is justified in deviating from the law of the road, and is actually bound to do so to avoid a collision.⁶

The statute prescribing the rule, that persons in carriages meeting on the highway must seasonably turn to the right of the center of the road, receives a reasonable interpretation. If the road be covered with deep snows or drifts, the parties are to turn to the right of the center of the beaten or traveled track.⁷ The statute in some of the States, in terms, requires travelers to keep to the right of the center of the worked portion of the road, which when covered with snow is construed to mean the beaten and traveled track.⁸

¹ *Turley v. Thomas*, 8 Carr. & Payne R. 104.

² *Pluckwell v. Wilson*, 5 C. & Payne, 375.

³ *Chaplin v. Hawes*, 3 C. & Payne, 554; *Kennard v. Burton*, 25 Maine, 39.

⁴ *Cruden v. Fentham*, 2 Esp. 685.

⁵ *Grier v. Sampson*, 27 Penn St. 183; *Wordsworth v. Willan*, 4 Esp. 273.

⁶ *Jackson v. Tollett*, 2 Stark. 37; *Wayde v. Carr*, 2 Dow. & K. 255.

⁷ *Smith v. Dygert*, 12 Barb. 613.

⁸ *Jaquith v. Richardson*, 8 Met. 213; *Johnson v. Small*, 5 B. Mon. 25.

§ 726. One man's failure to observe the law of the road does not justify another in purposely riding or driving against him; nor can an obstruction in the way be made a ground of action to one who rides upon it with great violence, or without using ordinary care;¹ nor can a private action be maintained to remove the obstruction.²

The practical operation and effect of the law or usage of the road appears when an action is brought to recover damages against a party, caused by his driving or turning on the wrong side. The injured party recovers when it appears that without fault on his part he was injured by the illegal and careless act of the defendant; and he fails to recover when it appears that his fault or negligence in any way contributed to the injury of which he complains.³

The fact that the plaintiff is on the wrong side of the road, at the time of a collision, indicates negligence; but it does not prevent a recovery where the defendant intentionally or unnecessarily drives against him. Keeping on the right side of the road, a party can only be required to exercise ordinary diligence to prevent a collision.⁴ The same rule holds when a person driving a span of horses is overtaken by another team, rushing against his wagon; he may recover, where he could not avoid the injury by the use of ordinary care.⁵ The carriage in advance has the right to occupy any part of the road; and the carriage attempting to pass should ordinarily calculate upon the exercise of this right, and so keep clear of a collision.⁶

§ 727. The rule of the road does not apply with respect to a carriage and a foot passenger; for as regards foot passengers, a carriage may go on either side of the road. But a foot passenger has a right to cross the carriage road, and a person driving a carriage on it is bound to use reasonable care to avoid driving against him.⁷ So in crossing the

¹ *Butterfield v. Forrester*, 11 East, 60; *Smith v. Smith*, 2 Pick. 621.

² *Dawson v. St Paul Fire Ins. Co.*, 15 Minn. 136; *Houck v. Wachter*, 34 Md. 265.

³ *Morris v. Phelps*, 2 Hilton, 38; *Burde v. N. Y. Dry Dock Co.*, 2 Hall, 151; *Lane v. Crombie*, 12 Pick. 177; *Kennard v. Burton*, 25 Maine, 39.

⁴ *Burdick v. Worrall*, 4 Barb. 596.

⁵ *Center v. Finney*, 17 Barb. 94; *Davies v. Mann*, 10 Mees. & Wels. 546. An act of neglect by the plaintiff preceding that of the defendant will not excuse the defendant where he has time to prevent an injury. *Brownell v. Flagler*, 5 Hill, 282, and note.

⁶ *Mahew v. Boyce*, 1 Stark. 423; *Bolton v. Colder*, 1 Watts, 360. The driver of the team behind may pass either to the right or to the left. *Clifford v. Tyman*, 61 N. H. 508. But the one so attempting to pass does so at his peril so far as to render him liable for damages he causes to the one he attempts to pass, unless the latter brought the disaster upon himself. *Avengo v. Hart*, 25 La. Ann. 235.

⁷ *Boss v. Litton*, 5 C. & Payne, 407; *Hawkins v. Cooper*, 8 C. & Payne, 473; *Wolf v. Beard*, 8 C. & Payne, 373; *Brand v. S. & Troy Railroad Co.*, 8 Barb. 368, 380. *Moebus v. Herrmann*, 108 N. Y. 349; *Murphy v. Orr*, 96 N. Y. 14.

streets of a city; neither footmen nor teams have any right of way superior to the other. They have each the right in common, and equally with the other, and are bound in its exercise to use reasonable care for their own safety, and to avoid doing injury to others in the exercise of the same equal right of way.¹ A person's failure to pull up in time, because his reins break, is no defense to an action for running down a footman.² And a failure to observe approaching teams as one is about crossing a street is not necessarily such contributory negligence as will defeat an action. The duty imposed upon a wayfarer at the crossing of a street by the track of a railroad to look both ways does not as a matter of law attach to such person when about to cross from one side to the other of a city street. The degree of caution he must exercise will be affected by the situation and surrounding circumstances.³

§ 728. The statute has no application to the meeting of railroad cars with common vehicles. The cars running in a grooved track cannot turn to the right or to the left; and so a cart or carriage about to meet a railroad car must yield the whole track, turning either to the right or to the left as is most convenient. And when a railroad runs lengthwise upon a street or highway, common vehicles have the right to travel on the track, across it or lengthwise. Of necessity the company has the right of way, other carriages being obliged to give the cars a free track; in other respects, they are bound to run their cars with prudence and discretion, so as to avoid collision with other conveyances.⁴ They are not bound to run on the right hand track, where the road has two tracks, and they are bound to use all reasonable means to avoid a collision.⁵ Their liability for the acts of the driver is prescribed by the principles of the common law.⁶

¹ *Cotton v. Wood*, 8 Com. Bench, 568, 571; 98 Eng. Com. Law, 571; *Barker v. Savage*, 45 N. Y. 191.

² *Cotterill v. Starkey*, 8 C. & Payne, 691; *Wakeman v. Robinson*, 1 Bing. 212.

³ *Moody v. Osgood*, 54 N. Y. 488; *Moebus v. Herrmann*, 108 N. Y. 349; *McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 459; *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420, 429.

⁴ *Hegan v. Eighth Avenue R. Co.*, 15 N. Y. 380; *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122. This is undoubtedly the rule as to street cars and vehicles moving in the same or opposite directions. But a railway crossing a street stands upon a different footing. The car has the right to cross and must cross the street, and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right over the other. The right of each must be exercised with due regard to the right of the other. *O'Neil v. Dry Dock, etc., R. R. Co.*, 129 N. Y. 125. See *McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 459; *Davenport v. Brooklyn City R. R. Co.*, 100 N. Y. 632; *Fenton v. Second Ave. R. R. Co.*, 126 N. Y. 625.

⁵ *Altreuter v. Hudson River R. Co.*, 2 E. D. Smith, 151.

⁶ *Whitaker v. Eighth Ave. R. R. Co.*, 51 N. Y. 295; 47 N. Y. 122.

A railroad company has the right to run its cars at full speed in crossing a highway, where it does not violate any statute law or municipal regulation. A citizen driving along the road must yield the right of way.¹ He must look out for the trains at the crossings, before driving on to the railroad track; and if he see a train approaching, it is his duty to wait until it has passed.²

On the canals, passenger or packet boats are entitled to a preference over freight boats;³ and when boats meet, they are required to observe the law and regulations, in passing each other;—a law similar to that of the road. In case of a collision, the injured party's right of action depends upon the same principles. Being free from fault, he can recover his damages against the negligent party.⁴

§ 729. *Duties by the Way.* The carrier of passengers is bound to observe his established and advertised regulations in respect to stopping for refreshments, rest or other purposes by the way; for the passenger is supposed to take his passage with an understanding, from which the law implies an agreement, entitling him to the accommodations offered.⁵ The time of departure from the intermediate places on the line is frequently the main inducement in the choice of conveyance; and where there is a general usage to allow certain intervals for refreshment, the carriers cannot vary at their pleasure those usages which are perhaps a reason for preferring their conveyance to the less convenient arrangement of other proprietors. But if the coachman refuses to wait, and actually leaves a passenger behind without good cause, it seems that the latter has a remedy, either in withholding the remainder of the fare, or, if that has all been paid, by an action on the case for a breach of the contract, namely, to convey the party to such a place at such a time; in which he may recover the actual damages he has sustained.⁶

A through passenger is entitled to the benefit of a regulation of a railroad company, allowing him and other passengers to stop by the way and afterwards renew the journey; and he is obliged to observe the regulation in its details, and where the rule requires it he must have his ticket endorsed by the conductor in order to entitle him to get upon another train and renew his journey upon the ticket.⁷ *Prima facie* a through ticket gives the right to a passage by a continuous journey;⁸

¹ Warner v. N. Y. Central R. Co., 44 N. Y. 465.

² Ernst v. Hudson River R. Co., 39 N. Y. 66; Wilds v. The Same, 24 N. Y. 430.

³ Farnsworth v. Groot, 6 Cowen, 698; Houghton v. Walce, 64 Barb. 613.

⁴ Rathbun v. Payne, 19 Wend. 399; Dygert v. Bradley, 8 Wend. 469.

⁵ Angell on Car. § 533.

⁶ Jeremy on Car. 23.

⁷ Denny v. N. Y. Central & Hudson R. R. Co., 5 Daly, 50.

⁸ Hamilton v. N. Y. Central R. Co., 51 N. Y. 100; Barker v. Coffin, 31 Barb. 556;

and so the right to stop over on the way, and afterwards renew the trip on the same ticket, depends upon the proof of some contract, regulation or custom allowing passengers that privilege. The ticket gives a right to ride by the usual and direct route; it does not give the right to go by an indirect and longer route.¹

§ 730. Carriers give special accommodations and privileges, a state-room on a steamboat, or a drawing-room car on a railroad, for a certain increase in the fare; or charging specially for this additional accommodation.² Railroads also sometimes issue tickets for specific trains, binding themselves to carry only on those trains. This course of business falls within recognized principles. But where a railroad company sells tickets, giving a right to a passage on any regular train, they are not at liberty to enforce a rule confining the use of the tickets to any given train; they must fulfill their contract.³ And they have the right to insist that passengers shall fulfill theirs, the tickets issued by them being treated as evidences of contract, and not as contracts.⁴ Both parties are, however, bound by any restrictive words stamped or printed upon a ticket delivered to a passenger.⁵

§ 731. In passing a place of danger, it is the duty of a carrier by coach to give the passengers notice thereof, so as to give them the option of proceeding or not; and this notice must be given in plain terms so as to afford an opportunity of avoiding the danger. The want of such a notice, where it is the carrier's duty to give it, may be considered by the jury as evidence of negligence in the driver or agent, such as to make his principals liable in damages for any accident that may happen.⁶

When a carrier is not answerable for the consequences of an accident, by reason of its being unavoidable, he is still bound to exercise the greatest diligence and care to anticipate and prevent to the utmost of his power subsequent injuries resulting or flowing from the same cause. If his carriage be broken or disabled, he is bound to stop instantly and have it repaired. The common carrier of goods, as we have seen, whose boat is stove in by running on a concealed snag, under such circumstances as to make it an inevitable accident, is still answerable if he

Drew v. Central Pacific R. R. Co., 51 Cal. 425. See *Elliott v. N. Y. C. & H. R. R. Co.*, 53 Hun, 79; *Auerbach v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 281.

¹ *Bennett v. N. Y. Central & Hudson R. R. Co.*, 5 Hun. 599.

² *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146; *Clark v. Burns*, 118 Mass. 275; *Cox v. N. Y. Central & H. R. Co.*, 6 Sup. Ct. (T. & C.) 409.

³ *Maroney v. Old Colony R.*, 106 Mass. 153.

⁴ *Cheney v. Boston R.*, 11 Met. 121; *Van Buskirk v. Roberts*, 31 N. Y. 661.

⁵ *Barker v. Coffin*, 31 Barb. 556; *Shedd v. Railroad Co.*, 40 Vt. 88; *Boston R. v. Proctor*, 1 Allen, 267; *Boice v. Hudson River R. Co.*, 61 Barb. 611; 54 N. Y. 512.

⁶ *Dudley v. Smith*, 1 Campb. 167; *Jeremy on Car.* 29.

subsequently neglect the proper means of securing and landing the cargo. In like manner the carrier of passengers, though not responsible for an accident, may be chargeable with the consequences resulting from it, where it is within his power to prevent an injury after the accident has occurred, and he fails to do so.¹ Indeed the slightest degree of neglect under such circumstances is sufficient to render him responsible in damages. His contract is not terminated by an inevitable accident; and hence he is still bound for the safety of his passengers, as far as human prudence and foresight will go;² increasing the care with the danger.³

V. PASSENGER CARRIERS BY WATER.

§ 732. In most respects passenger carriers by water are bound by the same duties and obligations as carriers by land; but there are some rules and regulations incident to the conveyance of passengers by water which deserve a separate consideration. The law imposes a certain responsibility upon the carrier in respect to the business, regarding the mode of conveyance as important to be considered only in the application of the principle.*

The duty to receive and carry safely is the same on the water as on the land; and the rule of diligence is the same.⁵ In either case the carrier is answerable for the utmost care, vigilance and skill, on the part of himself and all persons employed by him.⁶ And this degree of care and vigilance and skill is required in every branch of his business. He must take care that his carriage is roadworthy, and that his vessel is seaworthy. His agents must be competent to perform the duties they are entrusted to discharge, and he is responsible for the fidelity and skill with which they discharge them.⁷

Fewer cases have arisen against carriers of passengers on the seas than on the land, for the reason that personal injuries at sea, other than those which are common to passengers and crew, seldom happen; and as to those which do occur, the master and sailors have every motive which the love of life can furnish to avoid the dangers of the voyage and bring their vessel safely into port. Nevertheless, it does occasionally happen that the master fails in his duty, by the omission of that care and diligence which the law demands.

§ 733. The statutes of New York make some provisions to secure the

¹ Hall v. Connecticut River Steamboat Co., 13 Conn. R. 319.

² Stokes v. Saltonstall, 13 Peters, 181; 4 Esp. 259; 25 Maine, 39.

³ Indianapolis, etc., R. Co. v. Horst, 3 Otto, 93 U. S. R. 291.

⁴ 13 Wend. R. 611.

⁵ 2 Sumn. (Cir. Co.) R. 221.

⁶ Farwell v. Boston & Worcester Railroad Cor., 4 Met. R. 49.

⁷ 13 Peters R. 181.

safety of passengers on the navigable waters of the State; imposing certain rules of navigation, and requiring that boats carrying passengers and navigated by steam shall be provided with life-boats; prohibiting steamboats from racing and from generating an undue or unsafe quantity of steam.¹ For a violation of these provisions the statute imposes certain penalties upon the master, engineer or person in charge; and while these provisions do not furnish the rule and measure of duty, under a contract to carry passengers, the carrier is certainly liable for any injury caused by, or in the act of, violating the statute. The master on board has the control of the vessel, and must answer for mismanagement or neglect of duty.² The other officers and servants, acting under his command, are not liable on the contract; they are only liable criminally.³

The statute of the State also provides, that every person navigating any boat or vessel for gain, who shall willfully receive so many passengers, or such a quantity of other lading, on board of such boat or vessel that by means thereof the same shall sink or overset, and the life of any human being be thereby endangered, shall upon conviction be adjudged guilty of a misdemeanor; and the statute further provides that the captain or other person having charge of a steamboat used for the conveyance of passengers, and the engineer having charge of the boiler or any apparatus used for the generation of steam, shall be adjudged guilty of a misdemeanor, when from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, they shall create or allow to be created such an undue quantity of steam as to burst the boiler or other apparatus or machinery connected therewith, endangering human life.⁴ These provisions emphasize the duties of passenger carriers by water, using steam as the motive power.

§ 734. The rules of navigation, enforced by law, have grown up out of the usages of the sea; they have the same origin as our common law. They are the result of experience, and principally designed to regulate the course of steamboats and sailing vessels when they meet or pass each other or lie at anchor. Quite recently, for the purpose of preventing collisions, Congress has prescribed by statute the lights to be carried between sunset and sunrise by ocean-going steamers, and by steamboats and other craft navigating the bays, lakes, rivers or other inland

¹ 3 R. S. (7th ed.) 1992; Laws of 1839, Chap. 175, § 3; Laws of 1844, Chap. 248; Laws of 1849, Chap. 411; Penal Code, §§ 197-199.

² *Denison v. Seymour*, 9 Wend. 9, 11; *Snell v. Rich*, 1 John. R. 305; *Fenton v. Dublin Steam Packet Co.*, 8 Adolph. & Ellis, 835.

³ *Noble v. Paddock*, 19 Wend. 456; *Barnes v. Cole*, 21 Wend. 188.

⁴ 3 R. S. of N. Y. 796, 5th ed.; Penal Code, § 359. See Penal Code, § 197; also, §§ 360, 361.

waters of the United States ; the signals to be used in a fog or in heavy weather ; and the rules to be observed in the sailing and steering of steam or sail vessels when they are about to meet or cross each other's path. The design of the statute is to specify and render certain the lights to be carried, and the manner in which they shall be carried, by different classes of boats and vessels, so that the position, character and course of a vessel may be discovered and known by others on the water.¹ The statute, being authorized by that provision of the Constitution giving Congress power to regulate commerce, necessarily supercedes all pre-existing rules of local or State authority which are inconsistent with its provisions.²

Prior to the statute, vessels were accustomed to carry in the night time lights of warning to other vessels navigating the same waters ; and the want of such a light where it was customary to carry one was regarded as a circumstance of neglect, for which when it caused a collision the carrier was answerable.³ The difficulty was the want of a uniform usage in respect to the lights and the mode of carrying them ;⁴ a want which is supplied by the specific provisions of the statute.

Where the statute is silent, a State law will remain in force ; *e. g.*, a State law requiring rafts of timber or lumber in motion, on the Hudson, to show two red lights, one on each end of the raft, at least ten feet high.⁵

§ 735. One of the precautions, which the master of a vessel is bound by the dictates of prudence to take to avoid collision in a dark night, is to hang out a light in some conspicuous place, elevated so that it may be seen afar or as early as possible by other vessels passing that way. And this duty is quite imperative when a vessel lies at anchor, at the mouth of a harbor, in a much frequented track, or in the channel of a river. Independent of any positive rule of law, prudence demands the act as a natural means of safety ;⁶ and now the statute, recognizing the duty, requires expressly that all vessels at anchor in roadsteads or

¹ R. S. of U. S. 820-825. U. S. Stat. 1890, Chap. 802.

² *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; *The Corsica*, 9 Wall. 630; *City of Paris*, 9 Wall. 634; *Chesapeake*, 1 Benedict R. 23, 30, 476.

³ *Rathbun v. Payne*, 19 Wend. 399; *Barnes v. Cole*, 21 Wend. 188; *Waring v. Clarke*, 5 How. U. S. 441.

⁴ *Carsley v. White*, 21 Pick. 254.

⁵ 2 R. S. of N. Y. 951, 5th ed.; *Laws of 1841*, Chap. 65; *Craig v. Kline*, 65 Penn. St. 399.

⁶ *Simpson v. Hand*, 6 Whart. (Penn.) R. 311, 324; *Knowlton v. Sandford*, 32 Maine, 148; *Walker v. U. S. Ins. Co.*, 11 S. & R. 61; *Secombe v. Wood*, 2 Moody & R. 290.

fairways shall exhibit a white light, visible all round the horizon at a distance of at least one mile.¹

The lights must be carried in a proper manner, and in the absence of positive law, the custom is to be followed. The general duty of the master is to exercise due skill, care and caution in the navigation of his vessel, and he is to hang out a light of warning where that is the most appropriate and efficient, or the recognized mode of exercising the required care.² He is bound to keep a vigilant lookout for the same reason, and to use all proper precaution to avoid and prevent accidents; having done this, he is not liable for the results of an accident; though in a court of admiralty, where a collision occurs from misfortune, the damages are apportioned between the vessels.³

§ 736. Under the common law rule a party cannot recover damages for an injury caused by a collision, where his own negligence contributes to the collision; ⁴ or where the collision results from the want of care in the management of both vessels.⁵

The owners of an injured vessel lying aground in or near the channel of a navigable river may recover against the owners of a steamboat driving against her, or colliding with her, notwithstanding there was prior negligence in permitting the vessel to run aground; this prior negligence not being regarded as a proximate cause of the collision, which might have been prevented by the exercise of reasonable care and prudence in the management of the steamboat.⁶ The officers in command, having perfect control of her movements, are bound to use timely care and foresight in passing the stationary vessel.

The master may be guilty of negligence and want of skill in selecting the place where he will anchor his vessel, or in failing to exhibit proper lights.⁷ The case is different where his vessel runs and lies aground without fault on his part; and he may recover damages against the owners of a vessel running foul of his, by reason of a failure on their

¹ Rule Ten, R. S. of U. S. 822. U. S. Stat. 1890. Ch. 802, Art. 11.

² *Steamboat Co. v. Whilldin*, 4 Harring. R. 228. On the Delaware the custom is that vessels going against tide keep in shore, whilst those going with the tide keep out in the strength of the tide. This rule qualifies the general rule that steamboats keep to the right in passing. For a similar custom on the Thames, see *Malcomson v. Gen. Steam Nav. Co.*, 4 English (Moak), 183.

³ *Waring v. Clarke*, 5 How. U. S. 441, 502.

⁴ *Vanderplank v. Miller*, 1 Moody & M. 21.

⁵ *Lack v. Seward*, 4 Carr. & P. 106; *Vennal v. Garner*, 1 Crompt. & M. 21; *Mellon v. Smith*, 2 E. D. Smith, 462; *Steamboat Farmer v. McGraw*, 26 Ala. 189.

⁶ *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Holey v. Earle*, 30 N. Y. 208; *Davies v. Mann*, 10 M. & W. 545.

⁷ *Strout v. Foster*, 1 How. U. S. 89; ante, § 735.

part to use all the precaution and care called for by the circumstances. This rule was applied where the *Ontario* ran aground near the mouth of the harbor of Cleveland, and within the piers; and the *Chesapeake* in entering the harbor ran against her in that position, in the night time. Conceding that a vessel entering a harbor in the night time is put upon her utmost vigilance, the court held that the bare possibility that the master and men on the *Chesapeake* might have seen the *Ontario* in time to have stood off without entering the harbor, did not render the owners liable for the damages resulting from the collision.¹

"The law imposes upon all persons using a highway, whether upon land or water, the obligation to exercise ordinary care to avoid inflicting injury upon others. The degree of care which is thus imposed is not capable of exact definition in words. It is sometimes said to be that degree of care which a prudent man exercises about his own affairs. This definition, and all similar ones, plainly do not greatly aid the inquiry as to the exact limits of the care to be exercised in any particular case. The difficulty is inherent in the subject. * * Under some circumstances a very high degree of vigilance is demanded by the re-

¹ *Kelsey v. Barney*, 12 N. Y. 425; *The Scioto*, *Davies R.* 359.

A steamer entering a harbor is bound to use every reasonable precaution to avoid a collision with a vessel lying at anchor; and the anchored vessel is bound to use the diligence called for by her position. A decision rendered in the District Court at Baltimore illustrates the rule: "In the United States District Court, Judge Giles rendered a decision in the four cases of libel against the German steamship *Nurnberg*, growing out of the collision between the steamship and the Norwegian bark *Azow*, on the 8th of May, 1877. The principal libel was that of Morton Beyer, and other owners of the bark, who claimed \$35,000. It was stated in the libel that the bark *Azow*, while going down Chesapeake Bay, May 7, came to anchor. The steamship *Nurnberg*, coming up between 12 and 1 A. M., May 8, ran into the bark, the latter sinking in a few minutes. Four of the crew of the bark were killed or drowned, and the bark and cargo were lost. It was alleged that the bark had all the proper lights set, and that the collision was caused by the fault of those in charge of the steamship. The second libel was for \$22,500, the value of the cargo of corn, shipped by Gill & Fisher of Baltimore. The third libel was for \$5,000, for personal injuries inflicted by the collision, and the fourth, in a small amount of cargo shipped. The answer of the owners of the steamship denies that the lights required by law were lighted on the bark, or that she adopted any of the usual precautions to prevent a collision, or that the collision was caused through any fault or carelessness in the management of the steamer." Judge Giles, in deciding the cause, held, that usually the burden of proof is on the vessel in motion, and that the question is whether she used due care; that if she used due care, and the bark *Azow* failed to exhibit proper lights, that circumstance was to be considered as placing her in the wrong. He goes on to speak of the absence of a fog, and of the moderate speed of the steamer; of the failure in duty of the lookout on the bark, and of her want of a light, as bearing on and determining the fact of negligence on her part; dismissing the libel.

quirement of ordinary care. Where the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight."¹

§ 737. The party suffering damages by a collision cannot recover "where no fault can be found on either side;" that is to say, no recovery can be had for damages resulting from inevitable accident; and we find that the colliding of vessels is considered an inevitable accident, when it results notwithstanding both use every proper precaution against danger.²

In determining the degree of skill and care required by law, it is a rule that the master and men on board of a vessel cannot excuse their failure to control her movement at the very moment of the collision, where they have negligently brought her into a position rendering the accident inevitable; they are bound to exercise foresight to prevent reaching a point, where her movement cannot be controlled.³ They are bound to use skill in the navigation of their vessel, and they have a right to assume, and act upon the assumption that every other vessel will be navigated with like skill, especially upon a river crowded with craft of every kind;⁴ and so they are not chargeable with an accident resulting from a sudden failure in the movement or control of another boat.⁵ And it appears that a person on the vessel, or having property on the vessel thus mismanaged, cannot recover against the other vessel for injuries or losses arising from this fault in navigation; a recovery can only be had against the owners of the vessel which is in fault.⁶ But under the principle affirmed in this State, a passenger on the injured vessel should not be considered as so identified with the vessel that negligence in its management will defeat his recovery for a personal injury caused by the colliding vessel.⁷ If the collision results from

¹ Per JOHNSON, J., in *Kelsey v. Barney*, 12 N. Y. 425.

² *Grace Girdler*, 7 Wall. 203; *Fashion*, 1 Newb. Ad. 8; *Steinbach v. Rae*, 14 How. U. S. 532; *The Mabey & Cooper*, 14 Wall. 204; *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, 24 How. 307; *The Java*, 14 Wall. 189; *The Morning Light*, 2 Wall. 550; *The Ann Caroline v. Wells*, 2 Wall. 538.

³ *Crockett v. Newton*, 18 How. U. S. 581; *Austin v. N. J. Steamboat Co.*, 43 N. Y. 75, 80.

⁴ *Beck v. East River Ferry Co.*, 6 Robt. R. 82.

⁵ *Hoffman v. Union Ferry Co.*, 47 N. Y. 176.

⁶ *Simpson v. Hand*, 6 Whart. 311; *Kennard v. Burton*, 12 Maine, 39.

⁷ *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Brown v. N. Y. Central*, 32 N. Y. 597; *Webster v. Hudson River Road*, 38 N. Y. 260; *Eaton v. Boston & Lowell R.*, 11 Allen, 599.

negligence on the part of both vessels, he has a right to recover against both.¹

§ 738. The omission to comply with a statutory regulation or precautionary measure, directly contributing to an injury, deprives the negligent party of any claim to compensation.² A failure to comply with a prescribed rule of navigation, specifying the lights to be carried, is negligence; and existing at the time of a collision, it raises a strong presumption against the master and owners; it casts upon them the burden of showing that the injury did not result from the omission.³ The want of the required lights is of no avail, where it appears that the collision resulted from other causes; and where the evidence tends to show that the collision resulted from other causes, it becomes a question of fact for the jury whether the want of lights contributed to the injury.⁴

A failure to carry the required lights in a fog does not absolve another vessel from the duty of using all the usual and proper means to avoid a collision, such as reversing the engines or changing the course. As soon as the danger is discovered, both vessels are bound to accept the situation, and do all that can be done with safety to prevent injury; and if the vessel carrying proper lights fails in this duty, and a collision results from such failure, the master and owners are liable for the resulting damages. * * "If the absence of the proper signal lights, or the attempt to traverse the harbor in a dense fog, did not cause the collision or contribute to it, but the situation of the injured vessel was, notwithstanding these circumstances, seen by and known to the colliding vessel, and the collision could by the exercise of reasonable care and skill on the part of the latter have been avoided, the injured vessel doing all that could be done to avert the danger, the consequences must fall upon the vessel by whose acts and neglects the injury was caused. The damages in that case are attributable solely to the neglect and want of care and skill of the colliding vessel."⁵

§ 739. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both must be put to port, so that each may pass on the port side of the other; ⁶ and the rule

¹ *Colegrove v. N. Y. & N. H. & Harlem R. Co.*, 20 N. Y. 492. See *Bridge v. Grand Junction R. Co.*, 3 Mees. & Wels. 244; *Catlin v. Hills*, 8 Com. Bench, 123; *Child v. Hearn*, L. R. 9 Exch. 176; *Lockhart v. Lichtenthaler*, 46 Penn. St. 151. See also, *Hoffman v. Union Ferry Co.*, 47 N. Y. 176, 181.

² *Thorp v. Hammond*, 12 Wall. 408.

³ *Waring v. Clarke*, 5 How. U. S. 441.

⁴ *Whitehall Transp. Co. v. N. J. Steamboat Co.*, 51 N. Y. 369; 47 N. Y. 716.

⁵ Per ALLEN, J., in *Hoffman v. Union Ferry Co.*, 47 N. Y. 176, 184; *The City of Washington*, 2 Otto, 31; *The Sunnyside*, 1 Otto, 208; *The Gray Eagle*, 9 Wall. 511.

⁶ *The America*, 2 Otto, 432; *The Galatea*, 2 Otto, 439; *The Vanderbilt*, 6 Wall. 225; *Union S. S. Co. v. N. Y. & Va. S. S. Co.*, 24 How. 307.

is the same where two sail vessels are meeting end on, or nearly end on, or, as it is often termed, head and head, or nearly head and head.¹ These rules, reduced to the form of statute law in 1864, are often referred to as the law of the road; they did not originate in the statute; they had their origin in the rules of navigation existing long before the statute was passed.² They apply when sailing vessels or steam vessels are approaching each other from opposite directions, head and head, so as to involve risk of collision. Each vessel ports its helm and passes to the right; that is, on the port side of the other vessel. The rules do not apply when vessels are meeting each other at right angles;³ and they do apply when vessels on different courses must cross so near that, by

¹ *The Nichols*, 7 Wall. 656; *The Johnson*, 9 Wall. 146; *The Annie Lindsley*, 104 U. S. 185.

² *The Johnson*, 9 Wall. 146, 150. Damages were claimed in this case on account of a collision which occurred in the East River on the 9th of December, 1863, when the following Rules of Navigation were considered in force:—

“**RULE 1.** When steamers meet ‘head and head,’ it shall be the duty of each to pass to the right, or on the larboard side of the other; and either pilot, upon determining to pursue this course, shall give as a signal of his intention one short and distinct blast of his steam-whistle, which the other shall answer promptly by a similar blast of the whistle. But if the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting ‘head and head,’ or if the vessels are approaching in such manner, that passing to the right (as above directed) is unsafe, or contrary to rule, by the pilot of either vessels, the pilot so deciding shall immediately give two short and distinct blasts of the steam-whistle, which the other pilot shall answer by two similar blasts of his whistle, and they shall pass to the left, or on the starboard side of each other.

“**RULE 2.** When steamers are approaching each other in an oblique direction, they will pass to the right, as if meeting ‘head and head,’ and the signal by whistle shall be given and answered promptly, as in that case specified.

“**RULE 3.** If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given or answered erroneously, or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

“**RULE 4.** The signals, by blowing of the steam-whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting ‘head and head,’ or nearly so, but at all times when passing or meeting, at a distance within half a mile of each other, and whether passing to the starboard or larboard.

“**N. B.** The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel or in the vicinity of wharves; under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary, to guard against collisions or other accidents.”

³ *Hunt v. Hoboken Land & I. Co.*, 1 Hilton, 161, 165; 3 E. D. Smith, 144.

continuing their course they incur the risk of collision, head to head, or bow to bow, or nearly so; as where they are approaching each other on oblique courses.¹

Independent of the act of Congress, steam vessels are regarded in the light of vessels navigating with a fair wind, and are under obligation to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances. Having superior power to direct and control their course and speed, they must, in approaching them, take every precaution to keep out of the way of sailing vessels.² The rule of navigation permits a sailing vessel, when approaching a steamer, to hold on her course; and obliges the steamer, as a general rule, to keep out of the way.³

§ 740. The rule of the road does not require vessels or steamers, in all cases and under all circumstances, to pass each other on the right. Being about to meet, each must take such a course and direction as will be least likely to injure the other, and will be best calculated to avoid a collision; and that vessel or steamer which has the greatest facilities for choosing and taking its adopted course, the most facile and available motive power, and consequently the greater control over its own movements, is called upon to give the preference to the other, and yield to it in the choice of routes. This qualification of the rule of the road has been applied where a steamboat carrying passengers, coming up the Hudson at full speed with the tide in her favor, met a smaller steamboat encumbered with a tow, moving down the river about four miles an hour, in a wide channel. The circumstances were considered such as to require the steamboat moving with speed to avoid the other, and hold her liable in damages for a neglect of this duty.⁴

Every circumstance is to be considered in determining the duty of each vessel; *e. g.*, the tide, the wind, the relative position of the vessels, and the usual course or custom of navigation pursued on that water.⁵ Due regard must be had to all the dangers of navigation, and to the special circumstances which render a departure proper from the usual

¹ *Hunt v. Hoboken Land & I. Co.*, per WOODRUFF, J., 3 E. D. Smith, 144, 147.

² *Hawkins v. D. & O. Steamboat Co.*, 2 Wend. 452; *St. John v. Paine*, 10 How. U. S. 557; 9 Wall. 146, 153; *N. Y. & Balt. Trans. Co. v. Phila., etc.*, Nav. Co., 22 How. 461; *The Sea Gull*, 23 Wall. 165; *The Free State*, 91 U. S. 200.

³ *N. Y. & Liverpool U. S. Mail S. Co. v. Rumball*, 21 How. U. S. 372, 383; *The Warrior*, 4 English (Moak), 608; *Beal v. Marchais*, 8 English (Moak), 242; *The Sea Gull*, 23 Wall. 165; *The Adriatic*, 107 U. S. 512; *The Colorado*, 91 U. S. 692.

⁴ *Blanchard v. N. J. Steamboat Co.*, 59 N. Y. 292; 3 N. Y. S. C. (I. & C.) 771; *The St. John*, 7 Blatch. 220; *The Syracuse*, 9 Wall. 672.

⁵ *Malcomson v. Gen. Steam Nav. Co.*, 4 English (Moak), 183; *The Velocity*, Law Rep. 3 P. C. 44, 49.

rule of the road, or from the regulations for preventing collisions. There being no dangers of navigation, and no special circumstances justifying a departure from the ordinary rule, a vessel is bound to follow the rule of navigation which is applicable to the situation.¹ And yet a failure to comply with a rule of navigation, in a given particular, will not defeat a recovery for an injury not arising from the omission,² or which ought to have been prevented by the other vessel.

The rules of navigation require that a moving vessel shall keep a sufficient watch or lookout, properly placed, at night to guard against the danger of a collision. But the usual rule does not apply, or does not prevent a recovery of damages for an injury, where the collision could not have been guarded against by a lookout, or where it is clear that the want of one had no agency in causing the collision.³ The kind of lookout to be kept depends upon the presence of few or many vessels, the darkness of the night and the rate of speed.⁴

§ 741. It is proper for us in this connection to indicate the sources of the rules of navigation. A rule emanating from the Trinity House, although it does not constitute a law *per se*, is nevertheless regarded in England as a rule to be observed, having the approbation of the best masters, and being in most cases upheld by the court of admiralty.⁵ The Trinity House was originally chartered and organized as a guild or fraternity, under a religious name, for the advancement of commerce and for the protection of ships and vessels by proper regulations. It began as a society of good sailors and experienced masters and nautical men, who were clothed with power to erect light-houses and other sea-marks along the coast, to appoint pilots to conduct ships in and out of the river Thames, to settle the rates of pilotage, and among other things to hear and determine certain complaints of officers and seamen, under an appeal to the court of admiralty.⁶ It has been from time to time

¹ The Warrior, 4 English (Moak), 608; Morton v. Hutchinson; The Falkland and The Kestrel, 4 English (Moak), 191.

² Whitehall Transp. Co. v. N. J. Steamboat Co., 51 N. Y. 369; The Pennsylvania, 19 Wall. 125.

³ The Farragut, 10 Wall. 334; Thorp v. Hammond, 12 Wall. 408; 10 How. U. S. 557; Blanchard v. N. J. Steamboat Co., 59 N. Y. 292; The Ottawa, 3 Wall. 269; The Fannie, 11 Wall. 238; The Dexter, 23 Wall. 69; The Annie Lindsley, 104 U. S. 185; The Nachoochee, 137 U. S. 330.

⁴ The Iron Duke, 2 W. Rob. 377; Chamberlain v. Ward, 21 How. U. S. 548, 192; N. Y. Transp. Co. v. Phila. Steam Nav. Co., 22 How. U. S. 461.

⁵ The Duke of Sussex, 1 Wm. Rob. R. 274; The Velocity, Law Rep. 3 C. P. 4 English (Moak), 183, 187.

⁶ The society was chartered by Henry VIII., 1515, and established and confirmed under the name of the Master, Wardens and Assistants of the Guild or Fraternity of the Most Glorious and Undivided Trinity, and of St. Clement in the Parish of Dept-

variously modified, and now acts in respect to the general subject of navigation in a manner analogous to that of a board of merchants; its orders, without having the absolute and binding force of law, are treated as rules of good seamanship, of authority so far as, and because they are evidence of, the customary laws and usages observed by men engaged in the business of navigation. The Trinity masters and brethren still serve as a kind of advisory jury to assist on trials in the court of admiralty.¹

Recent regulations for preventing collisions at sea, made by a British order in council under an act of Parliament, have a more positive effect, like the rules prescribed by our act of Congress;² and yet they are to be interpreted like any other statute modifying, or in some cases rendering more explicit, the existing rules of navigation.³

§ 742. The duty of sailing vessels crossing each other's track has been reduced by statute to this expression: "When two sail-vessels are crossing so as to involve risk of collision, then, if they have the wind on different sides, the vessel with the wind on the port side shall keep out of the way of the vessel with the wind on the starboard side, except in the case in which the vessel with the wind on the port side is close-hauled, and the other vessel free, in which case the latter vessel shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the vessel which is to windward shall keep out of the way of the vessel which is to leeward." Under this rule, it being the duty of one vessel to keep out of the way, the other vessel is to keep her course;⁴ subject only to this qualification, that due regard must be had to the dangers of the navigation, and to the special circumstances which may render a departure from the rule necessary to avoid immediate danger.

The combination of circumstances, in which two meeting vessels find themselves, may be extensively varied by the state and direction of the wind, and the relative position of the vessels towards the wind and towards each other; and hence the law of the sea is continually modified to meet these changing circumstances. The analogous law of the road yields to emergencies, but not to so great an extent. In one case

ford, Strand, in the County of Kent; and it was allowed to receive a certain duty from ships for the support of lighthouses.

¹ 1 Wm. Rob. R. 274. See McCulloch's Dictionary; 4 English (Moak), 183, 187.

² The "Regulations for preventing Collisions at Sea" were made by an order in council, under the Merchant Shipping Amendment Act of July 29, 1862, and act of Congress was passed in 1864. See U. S. Stat. 1890. Ch. 802.

³ The Johnson, 9 Wall. 146; Steamship v. Rumball, 21 How. U. S. 372, 383; ante, §§ 739, 734.

⁴ R. S. of U. S. 823; Rules 17, 23 and 24. See U. S. Stat. 1890, Ch. 802. Art. 17.

the presiding judge in a district court took the testimony of experienced navigators, to this effect: "In our answer to former questions, we have stated the rule or usage to be, that when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack should give way, and thus each pass to the right. This rule should govern vessels too, sailing on the wind, and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward, that if both persist in their course the other will strike her on the leeward side abaft the beam, or near the stern, in such case the vessel on the starboard tack must give way, as she can do so with greater facility and less loss of time and distance than the other.¹ These rules are particularly intended to govern vessels approaching each other, under circumstances that prevent their course and movements being readily ascertained with accuracy; for instance, in a dark night or dense fog. At other times, circumstances may render it expedient and proper to depart from them; for we consider them all subordinate to the rule prescribed by common sense, and applicable to all cases, under any circumstances, which is that every vessel shall keep clear of every other vessel when she has the power to do so, notwithstanding such other may have taken a course not conformable to established usage. We can scarcely imagine a case in which it would be justifiable to persist in a course, after it had become evident that collision would ensue, if by changing such course the collision could be avoided."²

The Trinity House regulations are of authority for the same reason as decisions at common law; not as making, but simply recognizing the existing law of usage and custom.³ The decision of a court is the higher and more solemn evidence, but still only an evidence or witness of what the law is. In other words, the Trinity House regulations do not purport to enact, but to state certain rules as recognized and established by the usages of navigation.⁴

§ 743. When two sailing vessels meet, having the wind fair, the rule is, that each is to pass on the larboard hand. But if a vessel is going close-hauled to the wind, and another meeting her is going free, the rule at sea is, for the vessel meeting her to go to leeward; and the reason of it is, that otherwise the vessel going to windward would lose

¹ See *St. John v. Paine*, 10 How. U. S. 557.

² *Lowry v. Steamboat Portland*, 1 Law Rep. 313, 318, A. D. 1839. And see *The Elizabeth Jones*, 111 U. S. 514.

³ *Duke of Sussex*, 1 W. Rob. R. 274; 2 Kent's Comm. 230.

⁴ *The Friends*, 1 W. Rob. (N. A.) R. 478.

her position, and could not get in again, without another tack, and it would be an inconvenience to her, and not to the vessel going free. But the vessel having the wind may either go to leeward or windward as she best can; she is bound to suppose, as a general rule, that the vessel going to windward will keep her position; that is to say, the ship which is going to windward is to keep to windward, and the ship that has the wind free is to bear away.¹ It is but a modification of this rule, that a vessel sailing before or with the wind should make way for one that is sailing *by* or against it.² For the law imposes upon the vessel having the wind free or fair the obligation of taking proper measures to get out of the way of the vessel that is close-hauled, and of showing that she has done so, and if she does not the owners of it are responsible for the loss which ensues.³

As vessels that meet at sea may be crossing each other's track in every conceivable direction, it is impossible that any single rule should embrace all cases. But the principle animating these rules of navigation seems to be, that each vessel shall do its endeavor to avoid collision, and that that vessel shall give way or heave about to avoid the danger which can do so most easily and with the least inconvenience or loss of time.⁴ On this ground, a vessel sailing with a fair wind and moving more rapidly, and being more under the control of her officers and crew than a vessel which has not the wind, is bound to give way. The reason of this rule applies to steamboats at all times, since they have always a propelling power, equal to a favorable wind, which renders the vessel perfectly manageable.⁵ So, too, a vessel under sail must

¹ *Handasyde and Others v. Wilson and Others*, 3 Carr. & Payne R. 528.

² *Jameson v. Drinkald*, 12 Moore R. 148.

³ *The Woodrop Sims*, 2 Dodson's Rep. 83; *The Mary Eveline*, 16 Wall. 348; *St. John v. Paine*, 10 How. U. S. 557; *The Ann Caroline*, 2 Wall. 538; *Bentley v. Coyne*, 4 Wall. 509.

⁴ 3 Kent's Comm. 230, 231; *The Syracuse*, 9 Wall. 672.

⁵ *The Shannon*, 2 Hagg. R. 173; *N. Y. & Balt. Transp. Co. v. Phila., etc., Nav. Co.*, 22 How. U. S. 461; *St. John v. Paine*, 10 id. 557; *The Sea Gull*, 23 Wall. 165; *City of Paris*, 9 Wall. 634; *The Free State*, 91 U. S. 200; *Hawkins v. Dutchess & Orange Steamboat Co.*, 2 Wend. R. 452.

Action on the case for an injury to plaintiff's sloop by collision.

On the trial, it appeared that the vessels met just below the overslaugh below Albany; the sloop going down the river with a fair but light breeze at the rate of two miles an hour; the steamboat going up the river at the rate of six or seven miles an hour; the sloop had just crossed the bar in the usual channel, and necessarily ran near the eastern shore; the officers of both vessels hailed; the plaintiff on board of his sloop called to the officers of the steamboat to stop the engine; the pilot of the boat called to the plaintiff, who was at the helm of his sloop, to bear away; the plaintiff did bear away, but as he had but little headway on his vessel, he made but little

bear away from a vessel at anchor, because, being under motion, her direction may be easily changed.¹

§ 744. It is a rule of the Trinity House, adopted by the court of admiralty, "that when steam vessels on different courses must unavoidably and necessarily cross so near that by continuing their respective courses there would be a risk of coming into collision, each vessel shall put her helm to port so as always to pass on the larboard side of each other."² And the rule is doubtless the same whether the vessel is engaged in carrying passengers or freight, or whether it is under the command of the master or a pilot, who is considered master *pro hac vice*.³ In *Denison v. Seymour*, it is adjudged that the master of a steamboat, employed in the transportation of passengers, like the master of a vessel engaged in the merchant service, is answerable for the diligence of all to whom is entrusted the management of the vessel, and that he is liable for any injury done by running the steamboat navigated by him against and sinking another vessel, although the pilot, who received his appointment directly from the owners, is at the wheel steering the boat, and has at the time of the accident the exclusive control and direction of her course.⁴ In another case, against the master of a steamboat for running foul of a sloop on the Hudson river, the recorder, before whom the cause was tried, charged the jury that the defendant was *prima facie* liable for the injury, and that it lay upon him to show that it did not arise from negligence on the part of those who navigated the steamboat; that the question of negligence was a question of fact for the jury, and if they were of opinion that the plaintiff's vessel might have been avoided by the exercise of due diligence and watchfulness, plaintiff would be entitled to a verdict, unless by reason of the darkness of the night the accident was

progress; the engine of the steamboat was stopped, but the boat was not backed, as she might have been, and struck with her bow the waist of the plaintiff's sloop and injured her materially. By the court: "The real question is, whether the officers of the steamboat were not guilty of negligence in refusing or neglecting to exercise the power they possessed, which would have prevented the injury. The boat was perfectly under the control of its officers, the sloop was not; the officers of the boat did not endeavor to avoid the collision, which they might have done either by backing their boat or by going on the west side of the sloop, where there was room enough and water enough. The sloop was compelled to go near the east shore, in order to pass the bar with safety, and after passing the bar, the captain did all in his power to avoid the collision by endeavoring to go west of the boat; but, from the slow motion of the sloop, this was impracticable before the boat struck him."

¹ *The Neptune*, 1 Dod. Adm. Rep. 467; 3 Kent's Comm. 231; *The Virginia Ehrman*, 97 U. S. 309.

² *Duke of Sussex*, 1 W. Robinson (N. A.), R. 274.

³ *Bussey v. Donaldson*, 4 Dallas, 206.

⁴ *Denison v. Seymour*, 9 Wend. R. 9.

caused by the absence of a signal light on board of the sloop, there being no want of care on the part of those in charge of the steamboat; and the charge was sustained.¹ The owners are responsible for damages occasioned by the mismanagement of a ship, though under the care of a regular pilot and navigated in obedience to his directions; and the pilot is answerable to them.² It is true the owners have no voice in the choice of the pilot, and it is also true that the vessel is navigated on their account, and necessarily subject to the law of the port or place; it being the duty of the master to put his vessel in charge of a pilot as required by law. Being in charge of the vessel, the pilot is liable as if he were a common carrier; and the master, being excluded from any control, is not, for the time being, responsible for the movements of the vessel.³

§ 745. The principles of liability in cases of collision as administered in courts of admiralty are briefly stated by Sir William Scott in the case of the *Woodrop Sims*: There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party, as where the loss is occasioned by a storm, or any other *vis major*; in that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame, where there has been a want of due diligence on both sides; in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other.⁴

§ 746. At common law the plaintiff cannot recover damages for an

¹ *Foot v. Wiswall*, 14 John. R. 304.

² *Neptune the Second*, 1 Dodson R. 457. The employment and regulation of pilots is left to the State laws; R. S. of U. S. 823; *Commissioners of Pilots v. Pacific Mail S. Co.*, 52 N. Y. 609; but it is settled that Congress has the power to legislate on the subject, and thus suspend the State law. *Henderson v. Spofford*, 59 N. Y. 131.

³ *Brown v. Elwell*, 60 N. Y. 249; *Gillespie v. Zittlosen*, 60 N. Y. 449; *Smith v. Coudry*, 1 How. U. S. 28. The court in this case gives effect to the English statute and the law of the port. See also, *Carruthers v. Sydebotham*, 4 Maule & S. 577; *Attorney-General v. Case*, 3 Price, 302; 3 Kent's Comm. 176, and notes; *Cooley v. Port Wardens*, 12 How. U. S. 299. That the master is not liable, see *Snell v. Rich*, 1 John. R. 304; but see *Denison v. Seymour*, 9 Wend. 9, 11; *Yates v. Brown*, 8 Pick.

22.

⁴ 2 Dodson, R. 83.

injury by collision or otherwise, attributable in any degree to his own neglect or want of due care, unless the defendant has been guilty of some intentional wrong.¹ In a case of mutual negligence, the common law does not interpose in order to make an equitable partition of the damages, as is frequently done in courts of admiralty.² If the plaintiff has exercised ordinary care, and the defendant has been guilty of negligence causing the injury, the action for damages may be sustained.³ But the plaintiff cannot recover damages for an injury sustained by him in the act of resisting the defendant, or preventing him from the exercise of his legal right; as where the master of a freight boat on the canal refused to give the master of a packet boat carrying passengers the preference given him by statute in passing a lock, and a collision ensued causing a slight injury to the freight boat.⁴

§ 747. The manner of landing passengers from steamboats navigating the waters of this State is prescribed in certain cases by statute, requiring that, where the landing is effected by the use of a small boat, the engine of the steamboat shall be stopped while the passenger is getting into the small boat or out of it on board of the steamboat, and during the passage of the small boat to and from the shore, with this exception, that during such landing and receiving of passengers, the engine of the boat may be put in motion in order to keep the steamboat in proper direction, and prevent her from drifting or being driven on shore, and also in order to give sufficient force to carry the small boat to the shore.⁵ No passenger is permitted to enter the small boat, for the purpose of being landed, until it is completely afloat and wholly disengaged from the steamboat, except by a painter; the small boat to be supplied by a good and sufficient pair of oars, and to be signaled to the steamboat on leaving the shore and when she arrives at it.⁶ These and similar enactments serve but to particularize and specify duties already imposed upon the carrier, or involved in the general principle establishing his liability.

The same remark is applicable to the several acts of Congress, regulating the carriage of passengers in merchant vessels, restricting the number to be received to the reasonable capacity of the vessel, and requiring that the vessels shall be properly ventilated, and adequately supplied with provisions for the voyage. The duties of the carrier are minutely

¹ Barnes v. Cole, 21 Wend. R. 188; 5 Hill R. 282.

² Harlow v. Humiston, 6 Cowen R. 189; 5 Hill R. 283, note a.

³ 6 Cowen R. 192; Rathbun v. Payne, 19 Wend. R. 399; 1 Cowen R. 78.

⁴ Farnsworth v. Groat, 6 Cowen R. 698. The navigation of the canals is regulated very minutely by the statutes, 1 R. S. 271, 3d ed.; 1 R. S. 676, 7th ed.

⁵ 2 R. S., 949, 5th ed.; 3 id. 1992, 1993, 7th ed.

⁶ Idem.

specified, and penalties are imposed for the violation of them, so as to afford to the public a sufficient guaranty for their fulfillment, and thereby to counteract the carrier's temptation to crowd a great number of passengers, frequently emigrants of the poorer class, into a small vessel, exposing them to the diseases incident to a sea voyage, in an over-crowded and badly ventilated vessel. It was found by experience that the passenger's remedy against the carrier on his contract was not sufficient protection against this kind of imposition; and hence the statute law has provided a means of vindictive punishment, in the shape of penalties, thus making the carrier's avarice and caution the pledge of fidelity in the discharge of his duties. In this way his love of gain is arrayed against itself, and made to neutralize its vicious properties.¹

§ 748. Steam vessels are subject to a further and different kind of temptation, as well as to other and more numerous dangers. Accordingly, those acts of Congress which provide for the better security of the lives of passengers on board of vessels, propelled in whole or in part by steam, are of a much wider scope. They provide that such vessels shall be enrolled and licensed; that their boilers and machinery shall be duly inspected once every six months; that a certificate of such inspection shall be given and posted up in some conspicuous part of the boat; that the owners of such licensed boats shall employ a competent number of experienced and skillful engineers; that the steam shall be regulated and kept down in a particular manner; that every steam vessel engaged in the transportation of freight or passengers at sea or on the lakes shall carry two or more yawls or long-boats, according to her tonnage, each of which shall be competent to carry at least twenty persons; that each vessel shall be furnished with a suction hose and fire-engine and hose suitable to be worked in case of fire; that each vessel shall carry signal lights during the night; that a failure in these duties shall be visited by penalties and by indictment; that every captain, engineer, pilot or other person employed on such steam vessel by whose misconduct, negligence or inattention to his or their respective duties the life of any person on board may be destroyed, shall be deemed guilty of manslaughter, and on conviction sentenced to confinement at hard labor for a period of not more than ten years; and that in all actions against the owners of steamboats for injuries arising to person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such accident shall be taken as

¹ See acts of 1847, 1848, 1849, and R. S. of U. S. 825, 869.

full *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment.¹ Though these provisions do not establish any new principle of responsibility, they are of great importance as pointing out the particulars of the carrier's duty and furnishing to the public the means for its enforcement. As between the carrier and the passenger, a failure to comply with them is evidence of neglect, which in most cases of injury casts upon the carrier the burden of showing that the injury did not occur in consequence of his neglect or want of due diligence.

§ 749. These statutes were not intended to limit the common law liability of ship-owners, as carriers of passengers. Their object was to provide additional safeguards and better security for the lives of passengers on steam vessels; and to secure the observance of the law and the exercise of a vigilant supervision and care, in respect to the construction and equipment and management of steam-vessels, the owners are charged with an absolute liability, when passengers sustain injury from any neglect or failure to comply with the terms of the law.² The statute providing for the inspection of boilers does not in any manner limit the liability of the owners for their safety; and a compliance with the statute does not even remove the presumption of negligence arising from the bursting of a boiler.³

§ 750. In order that the master may properly discharge the important and responsible duties imposed upon him, the law clothes him with authority to control the movements of his vessel, and to give directions in respect to the government of passengers and crew. Especially in cases of emergency, he is necessarily invested with large discretionary power; since obedience to his commands is often the only means of safety for the ship. But the master is bound in all cases to provide for the comfort and convenience of the passengers on board, by such attention as may mitigate the evils of a dangerous or protracted voyage.⁴

It is the duty of the master of a vessel to take care that she be tight and staunch and seaworthy at the commencement of each voyage, and appropriately furnished with the tackle and apparel necessary for

¹ See acts of 1828, 1843, R. S. of U. S. 857. As to the criminal liability of a carrier for the killing of a person by reason of the overloading of a passenger vessel, see N. Y. Penal Code, § 197. As to liability for death caused by the bursting of the boiler of a passenger boat, see N. Y. Penal Code, § 198.

² *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, 139.

³ *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, 292.

⁴ *Chamberlain v. Chandler*, 3 Mason R. 242; 1 id. 508.

her safe navigation;¹ to sail at the time appointed and in the manner approved by skillful navigators; to pursue the direct course of the voyage without deviation;² and so far as possible to bring his vessel through the perils of the sea safely into port.³ For the proper discharge of his difficult duties, it is necessary that the master be a person of experience and practical skill in the art of navigation; that he possess the intellectual and moral power of commanding and governing his vessel, and that he be clothed with the authority to meet and cope with the dangerous vicissitudes of the voyage, to the best advantage. For this purpose, while at sea, he has something like autocratic power in the government of passengers as well as the crew, to the end that he may properly direct and control the movements of the vessel.⁴

¹ *Wedderburn v. Bell*, 1 Campb. R. 1.

² 6 Bing. R. 716.

³ *Abbott on Ship*. 340.

⁴ 3 Kent's Comm. 159.

APPENDIX.

LEGISLATIVE ENACTMENTS AND NOTES.

FROM THE PENAL CODE OF THE STATE OF NEW YORK.

CHAPTER XIII.

FRAUDULENT ISSUE OF DOCUMENTS OF TITLE TO MERCHANDISE.¹

- SECTION 628. Issuing fictitious bills of lading, etc.
629. Issuing fictitious warehouse receipts.
630. Erroneous bills of lading or receipts, issued in good faith, excepted.
631. Duplicate receipts must be marked "duplicate."
632. Selling, hypothecating or pledging property received for transportation or storage.
633. Bills of lading or receipts issued by warehousemen must be canceled on redelivery of the property.
634. Property demanded by process of law.

§ 628. **Issuing fictitious bills of lading, etc.**—A person, being the master, owner or agent of any vessel, or officer or agent of any railway, express or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt or other voucher, by which it appears that merchandise of any kind has been shipped on board a vessel, or delivered to a railway, express or transportation company, or other carrier, unless the same has been so shipped or delivered and is at the time actually under the control of such carrier, or the master, owner or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 629. **Issuing fictitious warehouse receipts.**—A person carrying on the business of a warehouseman, wharfinger, or other depositary of property, who issues any receipt, bill of lading or other voucher for merchandise of any kind which has not been actually received upon the

¹ Chapter 326 of the Laws of 1858, and Chapter 440 of the Laws of 1866, which are the sources of this statute, were repealed by Chapter 593 of the Laws of 1886.

premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 630. **Erroneous bills of lading or receipts, issued in good faith, excepted.**—No person can be convicted of an offense under the last two sections, for the reason that the contents of any barrel, box, case, cask or other vessel or package mentioned in the bill of lading, receipt or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponds substantially with the marks, labels or brands upon the outside of such vessel or package, unless it appears that the defendant knew that such marks, labels or brands were untrue.

§ 631. **Duplicate receipts must be marked "duplicate."**—A person mentioned in sections six hundred and twenty-eight and six hundred and twenty-nine, who issues any second or duplicate receipt or voucher, of a kind specified in those sections, at a time while a former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "duplicate," in a plain and legible manner, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 632. **Selling, hypothecating or pledging property received for transportation or storage.**—A person mentioned in sections six hundred and twenty-eight and six hundred and twenty-nine, who sells or pledges any merchandise for which a bill of lading, receipt or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 633. **Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.**—A person mentioned in section three hundred and twenty-nine, who delivers to another any merchandise for which a bill of lading, receipt or voucher has been issued, unless such receipt or voucher bears upon its face the words "not negotiable," plainly written or stamped, or unless such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 634. **Property demanded by process of law.**—The last two sections do not apply to any case where property is demanded by virtue of legal process.

FROM THE STATUTES OF THE UNITED STATES,
PASSED AT THE FIRST SESSION OF THE FIFTY-FIRST
CONGRESS, 1889-1890.

CHAPTER 802.

AN ACT TO ADOPT REGULATIONS FOR PREVENTING COLLISIONS AT
SEA.¹

Approved August 19, 1890.

Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assem-

bled, That the following regulations for preventing
collisions at sea shall be followed by all public and
private vessels of the United States upon the high seas
and in all waters connected therewith, navigable by
sea-going vessels.

Regulations for
preventing collisions
at sea.

PRELIMINARY.

Preliminary.

In the following rules every steam-vessel which is
under sail and not under steam is to be considered a
sailing vessel, and every vessel under steam, whether
under sail or not, is to be considered a steam-vessel.

Meaning of terms.

"Sailing vessel."

"Steam-vessel."

The word "steam-vessel" shall include any vessel
propelled by machinery.

What "steam-ves-
sel" includes.

A vessel is "under way" within the meaning of
these rules when she is not at anchor, or made fast to
the shore, or aground.

"Under way."

RULES CONCERNING LIGHTS, AND SO FORTH.

Rules concerning
lights, etc.

The word "visible" in these rules when applied to
lights shall mean visible on a dark night with a clear
atmosphere.

Meaning of "vis-
ible."

¹ This enactment is a substitute for section 4233 of the Revised
Statutes of the United States, containing rules for preventing col-
lisions on the water, and is an amplification of that section, with
certain modifications and changes. See R. S. of U. S., 820-825.

Period of compliance.

ARTICLE 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

Lights of steam-vessel under way.

ART. 2. A steam-vessel when under way shall carry—

White light forward.

(a) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

Visibility.

Green light, starboard side.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

Visibility.

Red light, port side.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

Visibility.

Inboard screens for green and red lights.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Additional white light.

(e) A steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The

Position and distance of two white lights.

vertical distance between these lights shall be less than the horizontal distance.

ART. 3. A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than six feet apart, and when towing more than one vessel shall carry an additional bright white light six feet above or below such light, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a), excepting the additional light, which may be carried at a height of not less than fourteen feet above the hull.

Steam-vessel when
towing another ves-
sel.
Lights.

When towing
more than one.
Additional light.

Character and
position of lights.

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.

Small white light
abaft.

Visibility restrict-
ed.

ART. 4. (a) A vessel which from any accident is not under command shall carry at the same height as a white light mentioned in article two (a), where they can best be seen, and if a steam-vessel in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart and of such a character as to be visible all around the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter.

Vessel not under
control.

White light.
Steam-vessel not
under control.
Two red lights.

Visibility.

Day signals.

Two black balls.

(b) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in article two (a), and if a steam-vessel in lieu of that light, three lights in a vertical line one over the other, not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all around the horizon, at a distance of at least two miles. By day she shall carry in a vertical line, one over the other, not less than six feet apart, where they can best be seen, three

Telegraph cable
vessel.
Night lights.

Day signals.

shapes not less than two feet in diameter, of which the highest and lowest shall be globular in shape and red in color and the middle one diamond in shape and white.

Signals only to be shown when making way.

(c) The vessels referred to in this article, when not making way through the water, shall not carry the side-lights, but when making way shall carry them.

Meaning of day and night signals.

(d) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command, and cannot therefore get out of the way.

Not distress signals.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in article thirty-one.

Lights for sailing vessel under way, and towed vessel.

ART. 5. A sailing vessel under way and any vessel being towed shall carry the same lights as are prescribed by article two for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

Small vessels under way in bad weather.

ART. 6. Whenever, as in the case of small vessels under way during bad weather, the green and red side-lights cannot be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides.

Portable side lights to be ready, etc.

Portable lanterns to be painted.

To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens.

Small steam-vessels, and certain vessels under oars or sails, under way.

ART. 7. Steam-vessels of less than forty, and vessels under oars or sails of less than twenty tons, gross tonnage, respectively, when under way, shall not be obliged to carry the lights mentioned in article two (a), (b) and (c), but if they do not carry them they shall be provided with the following lights:

Lieu lights they must carry.

Steam-vessels less than forty tons.

First. Steam-vessels of less than forty tons shall carry—

(a) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than nine feet, a bright white light constructed and fixed as prescribed in article two (a), and of such a character as to be visible at a distance of at least two miles.

Forward light.

(b) Green and red side-lights constructed and fixed as prescribed in article two (b) and (c), and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead to two points abaft the beam on their respective sides. Such lantern shall be carried not less than three feet below the white light.

Side lights, etc.

Combined lantern.

Second. Small steamboats, such as are carried by sea-going vessels, may carry the white light at a less height than nine feet above the gunwale, but it shall be carried above the combined lantern mentioned in subdivision one (b).

Small steamboats.

Position of white light.

Third. Vessels under oars or sails, of less than twenty tons, shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

Vessels under oars or sails.

Portable green and red lantern.

The vessels referred to in this article shall not be obliged to carry the lights prescribed by article four (a) and article eleven, last paragraph.

Limitation of lights.

ART. 8. Pilot-vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

Pilot-vessels on pilotage duty.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

Approaching other vessels.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show

Such as go alongside, etc.

the white light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

When not on pilotage duty.

Pilot-vessels when not engaged on their station on pilotage duty shall carry lights similar to those of other vessels of their tonnage.

Fishing-vessels and fishing-boats under way.

ART. 9. Fishing-vessels and fishing-boats when under way and when not required by this article to carry or show the lights therein named shall carry or show the lights prescribed for vessels of their tonnage under way.

Fishing with drift nets.

(a) Vessels and boats, when fishing with drift nets, shall exhibit two white lights from any part of the vessel where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than ten feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character as to show all around the horizon, and to be visible at a distance of not less than three miles.

Trawling.

(b) Vessels, when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

If steam-vessels.

First. If steam-vessels, shall carry in the same position as the white light mentioned in article two (a) a tri-colored lantern so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on either bow to two points abaft the beam on the starboard and port sides, respectively; and, not less than six nor more than twelve feet below the tri-colored lantern, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light all around the horizon.

If sailing vessels, seven tons and upwards.

Second. If sailing vessels, of seven tons gross tonnage and upwards, shall carry a white light in a lantern, so constructed as to show a clear, uniform, and un-

broken light all around the horizon, and shall also be provided with a sufficient supply of red pyrotechnic lights, which shall each burn for at least thirty seconds, and shall be shown on the approach of or to other vessels in sufficient time to prevent collision.

In the Mediterranean Sea the vessels referred to in subdivision (b) two may use a flare-up light in lieu of a pyrotechnic light. In Mediterranean Sea.

All lights mentioned in subdivision (b) one and two shall be visible at a distance of at least two miles. Visibility of lights.

Third. If sailing vessels of less than seven tons gross tonnage, shall not be obliged to carry the white light mentioned in subdivision (b) two of this article, but if they do not carry such light they shall have at hand, ready for use, a lantern showing a bright white light, which shall, on the approach of or to other vessels, be exhibited where it can best be seen, in sufficient time to prevent collision; and they shall also show a red pyrotechnic light, as prescribed in subdivision (b) two, or in lieu thereof a flare-up light. If sailing vessels, less than seven tons.

(c) Vessels and boats when line-fishing with their lines out and attached to their lines, and when not at anchor or stationary, shall carry the same lights as vessels fishing with drift-nets. Vessels and boats, line-fishing, etc.

(d) Fishing-vessels and fishing-boats may at any time use a flare-up light in addition to the lights which they are by this article required to carry and show. All flare-up lights exhibited by a vessel when trawling or fishing with any kind of drag-net shall be shown at the after part of the vessel, excepting that if the vessel is hanging by the stern to her fishing gear, they shall be exhibited from the bow. Fishing vessels and boats. Additional flare-up lights.

(e) Every fishing-vessel and every boat when at anchor shall exhibit a white light visible all around the horizon at a distance of at least one mile. At anchor.

(f) If a vessel or boat when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog-signal prescribed for a vessel at anchor respectively. (See article fifteen (d) (e) and last paragraph.) When fishing, gets fast to rock, etc.

(g) In fog, mist, falling snow, or heavy rain-storms drift-net vessels attached to their nets, and vessels In fog, mist, falling snow, or heavy rain.

when trawling, dredging, or fishing with any kind of drag-nets, and vessels line-fishing with their lines out, shall, if of twenty tons gross tonnage or upwards, respectively, at intervals of not more than one minute, make a blast; if steam-vessels with the whistle or siren, and if sailing-vessels with the fog-horn, each blast to be followed by ringing the bell.

Day signal.

(h) Sailing vessels or boats fishing with nets or lines or trawls, when under way, shall in day-time indicate their occupation to an approaching vessel by displaying a basket or other efficient signal, where it can best be seen.

Limitation.

The vessels referred to in this article shall not be obliged to carry the lights prescribed by article four (a) and article eleven, last paragraph.

A vessel being overtaken by another.

ART. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

Character and position of light.

The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of twelve points of the compass, namely, for six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side-lights.

Vessels at anchor. Under 150 feet in length.

ART. 11. A vessel under one hundred and fifty feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.

150 feet or more in length.

A vessel of one hundred and fifty feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

Length governed by registry.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

A vessel aground in or near a fair-way shall carry the above light or lights and the two red lights prescribed by article four (a). Vessel aground in or near fair-way.

ART. 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal. Additional lights and signals when necessary.

ART. 13. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal-lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by ship-owners, which have been authorized by their respective Governments and duly registered and published. Ships of war and convoys.
Certain authorized, etc., signals, etc., of any nation, not to be interfered with by these rules.

ART. 14. A steam-vessel proceeding under sail only, but having her funnel up, shall carry in day-time, forward, where it can best be seen, one black ball or shape two feet in diameter. Steam-vessel under sail only, etc.
Day signal.

SOUND SIGNALS FOR FOG, AND SO FORTH.

Sound signals for fog, etc.

ART. 15. All signals prescribed by this article for vessels under way shall be given :

1. By "steam-vessels" on the whistle or siren.

"Steam-vessels."

2. By "sailing vessels and vessels towed" on the fog-horn.

"Sailing vessels and vessels towed."

The words "prolonged blast" used in this article shall mean a blast of from four to six seconds' duration.

Meaning of "prolonged blast."

A steam-vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog-horn, to be sounded by mechanical means, and also with an efficient bell. [In all cases where the rules require a bell to be used a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small sea-going vessels.] A sailing vessel of twenty tons gross tonnage or upward shall be provided with a similar fog-horn and bell.

Sound instruments to be provided on steam-vessels.

Substitutes on Turkish and small vessels.

Sailing vessels of 20 tons and over.

Day and night fog, etc., signals. In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, viz. :

Steam-vessel having way upon her. (a) A steam-vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

Steam-vessel under way, but stopped, etc. (b) A steam-vessel under way, but stopped, and having no way upon her, shall sound, at intervals of not more than two minutes, two prolonged blasts, with an interval of about one second between them.

Sailing vessel under way. (c) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the star-board tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.

Vessel at anchor. (d) A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds.

Vessel at anchor at sea, etc. (e) A vessel at anchor at sea, when not in ordinary anchorage ground, and when in such a position as to be an obstruction to vessels under way, shall sound, if a steam-vessel, at intervals of not more than two minutes, two prolonged blasts with her whistle or siren, followed by ringing her bell; or, if a sailing vessel, at intervals of not more than one minute, two blasts with her fog-horn, followed by ringing her bell.

Vessel when towing. (f) A vessel when towing shall, instead of the signals prescribed in subdivisions (a) and (c) of this article, at intervals of not more than two minutes, sound three blasts in succession, namely, one prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

Steam-vessel without way. (g) A steam-vessel wishing to indicate to another "The way is off my vessel, you may feel your way past me," may sound three blasts in succession, namely, short, long, short, with intervals of about one second between them.

Telegraph-cable vessels. (h) A vessel employed in laying or picking up a telegraph cable shall, on hearing the fog-signal of an approaching vessel, sound in answer three prolonged blasts in succession.

Vessel unable to get out of the way. (i) A vessel under way, which is unable to get out of

the way of an approaching vessel through being not under command, or unable to maneuver as required by these rules, shall, on hearing the fog-signal of an approaching vessel, sound in answer four short blasts in succession.

Sailing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals, but, if they do not, they shall make some other efficient sound-signal at intervals of not more than one minute.

Certain sailing vessels and boats may make other sound signals.

SPEED OF SHIPS TO BE MODERATE IN FOG, AND SO FORTH.

Speed of ships in fog, etc.

ART. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

Vessels must moderate speed in fog, etc.

A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Steam-vessels under certain conditions stop engines, etc.

STEERING AND SAILING RULES.

Steering and sailing rules.

PRELIMINARY—RISK OF COLLISION.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

Ascertainment of risk of collision.

ART. 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

Rules of avoidance of risk.

Two sailing vessels approaching one another.

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.

Two steam-vessels meeting, end on.

ART. 18. When two steam-vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

Applicable cases.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as

Non-applicable cases.

to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

Cases where applicable by day and by night.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such position as to see both the side-lights of the other.

Where inapplicable day and night.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Two steam-vessels crossing.

ART. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Steam and sailing vessels meeting.

ART. 20. When a steam-vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing vessel.

What vessel shall keep her course, etc.

ART. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

ART. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. Crossing ahead.

ART. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. Certain steam-vessels to slacken speed, etc.

ART. 24. Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel. The overtaking vessel to keep out of the way, etc.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking, that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear. Definition of "overtaking vessel," etc.

At night.

As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way. By day.

ART. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel. Steam-vessels in narrow channels.

ART. 26. Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing vessels or boats. Sailing vessels under way must avoid fishing-boats, etc.

Fishing-boats not to obstruct fair-ways.

ART. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. Obedience to and construction of rules.

Sound-signals for vessels in sight. SOUND-SIGNALS FOR VESSELS IN SIGHT OF ONE ANOTHER.

Meaning of "short blast," ART. 28. The words "short blast" used in this article shall mean a blast of about one second's duration.

Steam-vessel under way, to signal her course by whistle, etc. When vessels are in sight of one another, a steam-vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

Meaning of one short blast. One short blast to mean, "I am directing my course to starboard."

Of two short blasts. Two short blasts to mean, "I am directing my course to port."

Of three short blasts. Three short blasts to mean, "My engines are going at full speed astern."

No vessel, under any circumstances, to neglect precautions. NO VESSEL, UNDER ANY CIRCUMSTANCES, TO NEGLECT PROPER PRECAUTIONS.

ART. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of rules for harbors and inland waters. RESERVATION OF RULES FOR HARBORS AND INLAND NAVIGATION.

ART. 30. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters.

Distress signals.

DISTRESS SIGNALS.

ART. 31. When a vessel is in distress and requires assistance from other vessels or from the shore, the following shall be the signals to be used or displayed by her, either together or separately, namely:

In day-time. In the day time—

First. A gun fired at intervals of about a minute;

Second. The International Code signal of distress indicated by N C ;

Third. The distance signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball ;

Fourth. Rockets or shells as prescribed below for use at night ;

Fifth. A continuous sounding with any fog-signal apparatus.

At night—

At night.

One. A gun fired at intervals of about a minute ;

Two. Flames on the vessel (as from a burning tar-barrel, oil-barrel, and so forth) ;

Three. Rockets or shells, bursting in the air with a loud report and throwing stars of any color or description, fired one at a time at short intervals ;

Four. A continuous sounding with any fog-signal apparatus.

SEC. 2. That all laws or parts of laws inconsistent with the foregoing regulations for preventing collisions at sea, for the navigation of all public and private vessels of the United States upon the high seas, and in all waters connected therewith navigable by sea-going vessels, are hereby repealed.

Repeal of conflicting laws.
R. S., secs. 4233,
pp. 815-818.
Vol. 23, p. 438.

SEC. 3. That this act shall take effect at a time to be fixed by the President by proclamation issued for that purpose.

Operation.

Approved, August 19, 1890.

FROM REVISED STATUTES OF THE UNITED STATES.

CHAPTER FIVE.

NAVIGATION.

Sec. 4234. Forfeiture of sailing vessels for omission of lights.	Sec. 4243. Superintendents and keepers.
4235. State regulations of pilots.	4244. Crews of surfmen.
4236. Pilots on boundaries between States.	4245. Stations at light-houses.
4237. No discrimination in rates of pilotage.	4246. Care of boats.
4238. Vessels stranded on foreign coasts.	4247. Keepers, etc., at stations on coasts of Cape Cod and Rhode Island.
4239. Property wrecked on coast of Florida.	4248. Supervision of stations on coast of Rhode Island.
4240. Forfeitures for taking such property to foreign port.	4249. Stations on coasts of Maine, New Hampshire, Massachusetts, Virginia, etc.
4241. License to wreckers on Florida coast.	4250. Removal of captain by owners of vessels.
4242. Life-saving stations on coasts of Long Island, etc.	4251. Canal-boats not to be libeled for wages.

Forfeiture of sailing vessels for omission of lights.

28 Feb., 1871, c. 100, s. 70, v. 16, p. 459.

SEC. 4234. Collectors, or other chief officers of the customs, shall require all sail-vessels to be furnished with proper signal-lights, and every such vessel shall, on the approach of any steam-vessel during the nighttime, show a lighted torch upon that point or quarter to which such steam-vessel shall be approaching. Every such vessel that shall be navigated without complying with the provisions of this and the preceding section, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel, in any district court of the United States having jurisdiction of the offense.

State regulation of pilots.

7 August, 1789, c. 9, s. 4, v. 1, p. 54.

Gibbons vs. Ogden, 9 Wh., 207; Hobart vs. Drogan, 10 Pet., 121; License cases, 5 How., 580; Cooley vs. Board of Wardens, 12 How., 299; *Ex parte* McNeil, 3 Wall., 236.

SEC. 4235. Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose.

TITLE XLVIII.—COMMERCE AND NAVIGATION.—CH. 5. 639

SEC. 4236. The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port.

Pilots on boundaries between States.

2 March, 1837, c. 22, v. 5, p. 153.

SEC. 4237. No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated.

No discrimination in rates of pilotage.

13 July, 1866, c. 177, v. 14, p. 93.

SEC. 4238. Consuls and vice-consuls, in cases where vessels of the United States are stranded on the coasts of their consulates respectively, shall, as far as the laws of the country will permit, take proper measures, as well for the purpose of saving the vessels, their cargoes and appurtenances, as for storing and securing the effects and merchandise saved, and for taking inventories thereof; and the merchandise and effects saved, with the inventories thereof so taken, shall, after deducting therefrom the expenses, be delivered to the owners. No consul or vice-consul shall have authority to take possession of any such merchandise, or other property, when the master, owner, or consignee thereof is present or capable of taking possession of the same.

Vessels stranded on foreign coasts.

14 April, 1792, c. 24, s. 3, v. 1, p. 255.

SEC. 4239. All property, of any description whatsoever, which shall be taken from any wreck, from the sea, or from any of the keys and shoals, within the jurisdiction of the United States, on the coast of Florida, shall be brought to some port of entry within the jurisdiction of the United States.

Property wrecked on the coast of Florida.

3 March, 1825, c. 107, s. 2, v. 4, p. 133.

SEC. 4240. Every vessel which shall be engaged or employed in carrying or transporting any property whatsoever, taken from any wreck, from the sea, or from any of the keys or shoals, within the jurisdiction of the United States, on the coast of Florida, to any foreign port, shall, together with her tackle, apparel,

Forfeitures for taking wrecked property to foreign ports.

3 March, 1825, c. 107, s. 1, v. 4, p. 132.

and furniture, be forfeited, and all forfeitures incurred by virtue of this section shall accrue, one moiety to the informer and the other to the United States.

License to wreck-
ers on Florida coast.

23 Feb., 1847, c.
20, s. 3, v. 9, p. 131.

SEC. 4241. No vessel, or master thereof, shall be regularly employed in the business of wrecking on the coast of Florida without the license of the judge of the district court for the district of Florida; and, before licensing any vessel or master, the judge shall be satisfied that the vessel is seaworthy, and properly and sufficiently fitted and equipped for the business of saving property shipwrecked and in distress; and that the master thereof is trustworthy, and innocent of any fraud or misconduct in relation to any property shipwrecked or saved on the coast.

Life-saving sta-
tions on coast of
Long Island, etc.

14 Dec., 1854, c.
1, s. 1, v. 10, p. 597.

SEC. 4242. The Secretary of the Treasury may establish such stations on the coasts of Long Island and New Jersey, for affording aid to shipwrecked vessels thereon, and may make such changes in the location of the existing stations, and make such repairs and furnish such apparatus and supplies as may, in his judgment, be best adapted to the preservation of life and property from such shipwrecked vessels.

Superintendents
and keepers.

14 Dec., 1854, c.
1, s. 2, v. 10, p. 597.
20 April, 1871, c.
21, s. 27, v. 17, p. 12.

SEC. 4243. The Secretary of the Treasury may appoint, at each of the stations established under the provisions of the preceding section, a keeper, at a compensation not exceeding two hundred dollars a year, and a superintendent, who shall also have the powers and perform the duties of an inspector of the customs for each of the coasts therein mentioned; and he shall give such keepers and superintendents proper instructions relative to the duties to be required of them.

Crews of surfmen.

20 April, 1871, c.
21, s. 27, v. 17, p. 12.

SEC. 4244. The Secretary of the Treasury may also employ crews of experienced surfmen at such stations on the coast of Long Island and New Jersey, and for such periods as he may deem necessary and proper, and at such compensation as he may deem reasonable, not to exceed forty dollars a month for each person to be employed.

Stations at light-
houses.

14 Dec., 1854, c. 1,
s. 4, v. 10, p. 597.

SEC. 4245. The Secretary of the Treasury may also establish such stations at such light-houses as, in his judgment, he shall deem best, and the keepers of such

lights shall take charge of such boats and apparatus as may be put in their charge respectively, as a part of their official duties.

SEC. 4246. No boat shall be purchased and located, under the provisions of the four preceding sections, at any point other than on the coasts of Long Island and New Jersey, unless the same be placed in the immediate care of an officer of the Government, or unless bond shall be given by proper individuals, living in the neighborhood, conditioned for the care and preservation of the same, and its application to the uses intended.

Care of boats.
14 Dec., 1854, c. 1, s. 3.

SEC. 4247. The Secretary of the Treasury may appoint a keeper for each of the ten life-saving stations on the coasts of Cape Cod, Massachusetts, and Block Island, Rhode Island, whose compensation shall be at the rate of two hundred dollars per annum, and may employ crews of experienced surfmen at such stations and for such periods as he may deem necessary and proper, and at such compensation as he may deem reasonable, not to exceed forty dollars per month for each person to be employed. [See § 223.]

Keepers, etc., at stations on coasts of Cape Cod and Rhode Island.
11 Jan., 1873, c. 34, v. 17, p. 410.

SEC. 4248. The life-saving stations at Narragansett Pier, and Block Island, Rhode Island, shall be under the supervision of the superintendent of life-saving stations for the coast of Long Island.

Supervision of stations on coast of Rhode Island.
Ibid.

SEC. 4249. The Secretary of the Treasury shall provide for the establishment of ten life-saving stations on the coasts of Maine, New Hampshire, and Massachusetts, Virginia, and North Carolina, at such points as he may deem necessary, for the saving of life and property on said coasts: *Provided*, That all life-saving stations hereafter erected shall be erected under the supervision of two captains of the revenue service, to be designated by the Secretary of the Treasury, and to be under his direction.

Stations on coasts of Maine, N. H., Mass., Virginia, etc.
3 March, 1873, c. 307, s. 1, v. 17, p. 619.

SEC. 4250. Any person or body-corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner. This section shall not apply where there is a valid written agreement subsisting, by virtue of which such master would be entitled

Removal of captain by owners of vessels.
9 April, 1872, c. 90, v. 17, p. 51.

to possession, nor in any case where a master has possession as part owner, obtained before the nineteenth day of April, eighteen hundred and seventy-two.

Canal-boats not to
be libeled for wages.
20 July, 1846, c. 60,
s. 1, v. 9, p. 38.

SEC. 4251. No canal-boat, without masts or steam-power, which is required to be registered, licensed, or enrolled and licensed, shall be subject to be libeled in any of the United States courts for the wages of any person who may be employed on board thereof, or in navigating the same.

CHAPTER SIX.

TRANSPORTATION OF PASSENGERS AND MERCHANDISE.

Sec. 4252. Space for passengers in ves- sels arriving from foreign ports.	Sec. 4273. Informers.
4253. Penalty for taking too many passengers.	4274. Vessels carrying passengers without the United States.
4254. Lockers and hospitals.	4275. Penalty upon visiting part of vessel assigned to emi- grants.
4255. Berths.	4276. Penalty for permitting offi- cers or seamen to visit such part of vessel.
4256. Houses on deck.	4277. Notice to be posted in emi- grant-vessels.
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Space for passen-
gers in vessels arriv-
ing from foreign
ports.

3 March, 1855, c.
213, s. 1, v. 10, p.
715.

4 July, 1864, c. 249,
s. 1, v. 13, p. 390.

SEC. 4252. No master of any vessel owned in whole or in part by a citizen of the United States, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place other than foreign contiguous territory of the United States, passengers contrary to the provisions of this section, with intent

to bring such passengers to the United States and leave such port or place and bring such passengers, or any number thereof, within the jurisdiction of the United States. The number of such passengers shall not be greater than in the proportion of one to every two tons of such vessel, not including children under the age of one year in the computation, and computing two children over one and under eight years of age as one passenger. The spaces appropriated for the use of such passengers, and which shall not be occupied by stores or other goods, not the personal baggage of such passengers, shall be in the following proportions: On the main and poop decks or platforms, and in the deck-houses, if there be any, one passenger for each sixteen clear superficial feet of deck, if the height or distance between the decks or platforms shall not be less than six feet; and on the lower deck, not being an orlop deck, if any, one passenger for eighteen such clear superficial feet, if the height or distance between the decks or platforms shall not be less than six feet, but so as that no passenger shall be carried on any other deck or platform, nor upon any deck where the height or distance between decks is less than six feet. But on board two-deck ships, where the height between the decks is seven and one-half feet or more, fourteen clear superficial feet of deck shall be the proportion required for each passenger. The term "contiguous territory," as used in this section, shall not be held to extend to any port or place connecting with any interoceanic route through Mexico.

SEC. 4253. Whenever the master of any such vessel takes on board of the same, at any foreign port or place, other than such contiguous territory, any greater number of passengers than in the proportion to the space or to the tonnage prescribed in the preceding section, with intent to bring such passengers to the United States, and leaves such port or place and brings such passengers within the jurisdiction of the United States, or takes on board his vessel, at any port or place within the jurisdiction of the United States, any greater number of passengers than in the proportion to the space or to the tonnage prescribed by the preceding section,

Penalty for taking too many passengers.

3 March, 1855, c. 213, s. 1, v. 10, p. 716.

U. S. vs. Brig Neurea, 19 How., 94.

with intent to carry the same to any foreign port or place other than such foreign contiguous territory, he shall be deemed guilty of a misdemeanor, and shall, for each passenger taken on board beyond such limit or space, be fined fifty dollars, and may also be imprisoned for not exceeding six months.

Lockers and hospitals.

3 March, 1855, c. 213, s. 1, v. 10, p. 716.

SEC. 4254. Should it be necessary for the safety or convenience of such vessel that any portion of her cargo, or any other article, should be placed on or stored in any of the decks, cabins, or other places appropriated to the use of passengers, the same may be placed in lockers or inclosures prepared for the purpose, on an exterior surface impervious to the waves, capable of being cleansed in like manner as the decks or platforms of the vessel. But in no case shall the places thus provided be deemed to be a part of the space allowable for the use of passengers, but the same shall be deducted therefrom; and in all cases where such lockers or enclosed spaces are prepared or used, the upper surface thereof shall be deemed the deck or platform from which measurement shall be made for all the purposes of this chapter. One hospital, in the spaces appropriated to passengers, and separate therefrom by an appropriate partition, and furnished as its purposes require, may be prepared, and, when used, may be included in the space allowable for passengers; but the same shall not occupy more than one hundred superficial feet of deck or platform.

Berths.

3 March, 1855, c. 213, s. 2, v. 10, p. 716.

The Steamship Manhattan, 2 Ben., 88.

SEC. 4255. No such vessel shall have more than two tiers of berths. The interval between the lowest part thereof and the deck or platform beneath shall not be less than nine inches; and the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions, as berths ordinarily are separated, and shall be at least six feet in length, and at least two feet in width, and each such berth shall be occupied by no more than one passenger; but double berths of twice the above width may be constructed, each berth to be occupied by no more and by no other than two women, or by one woman and two children under the age of eight years, or by husband and wife, or by a man and two of his own

children under the age of eight years, or by two men, members of the same family. For any violation of this section, the master of the vessel, and the owners thereof, shall severally be liable to a penalty of five dollars for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart.

SEC. 4256. All vessels, whether of the United States or any foreign country, having sufficient space, according to law, for fifty or more passengers, other than cabin passengers, shall, when employed in transporting such passengers between the United States and Europe, have, on the upper deck, for the use of such passengers, a house over the passenger-way leading to the apartments allotted to such passengers below deck, firmly secured to the deck or combings of the hatch, with two doors, the sills of which shall be at least one foot above the deck, so constructed that one door or window in such house may at all times be left open for ventilation. All vessels so employed, and having the capacity to carry one hundred and fifty such passengers or more, shall have two such houses; and the stairs or ladder leading down to such apartments shall be furnished with a hand-rail of wood or strong rope; but booby-hatches may be substituted for such houses.

Houses on deck.

3 March, 1855, c.
213, s. 3, v. 10, p.
716.

SEC. 4257. Every such vessel so employed in transporting passengers between the United States and Europe, and having space according to law for more than one hundred such passengers, shall have at least two ventilators to purify each apartment occupied by such passengers; one of which shall be inserted in the after part, and the other in the forward part of the apartment, and one of them shall have an exhausting-cap to carry off the foul air, and the other a receiving-cap to carry down the fresh air. Such ventilators shall have a capacity proportioned to the size of the apartments to be purified, namely: If the apartments will lawfully authorize the reception of two hundred such passengers, the capacity of each of such ventilators shall be equal to a tube of twelve inches diameter in the clear, and in proportion for larger or smaller apartments. All such ventilators shall rise at least four

Ventilators.

3 March, 1855, c.
213, s. 4, v. 10, p.
717.

feet six inches above the upper deck of any such vessel, and be of the most approved form and construction. If it appears from the report to be made and approved, as provided in section forty-two hundred and seventy-two, that such vessel is equally well ventilated by any other means, such other means of ventilation shall be deemed to be a compliance with the provisions of this section.

Cooking-range.

3 March, 1855, c.
213, s. 5.

SEC. 4258. Every vessel carrying more than fifty such passengers, and engaged in transporting them between the United States and Europe, shall have for their use on deck, housed and conveniently arranged, at least one camboose or cooking-range, the dimensions of which shall be equal to four feet long and one foot six inches wide for every two hundred passengers; and provision shall be made in the same manner, in this ratio, for a greater or less number of passengers; but nothing in this section shall take away the right to make such arrangements for cooking between decks, if that shall be deemed desirable.

Penalty for neglecting to comply with requirements.

3 March, 1855, c.
213, s. 8, v. 10, p.
718.

SEC. 4259. The master and owner of any such vessel so employed, which shall not be provided with the house or houses over the passageways, or with the ventilators, or with the cambooses or cooking-ranges with the houses over them, required by this Title, shall severally be liable to a penalty of two hundred dollars for each and every violation of, or neglect to conform to, each of these requirements, to be recovered by suit in any circuit or district court of the United States within the jurisdiction of which such vessel may arrive, or from which she may be about to depart, or at any place within the jurisdiction of such courts, wherever the owner or master of such vessel may be found.

Provisions.

3 March, 1855, c.
213, s. 6, v. 10, p.
717.

SEC. 4260. All vessels so employed in transporting passengers between the United States and Europe shall have on board, for the use of such passengers, at the time of leaving the last port whence such vessel shall sail, well secured under deck, for each passenger, at least twenty pounds of good navy bread, fifteen pounds of rice, fifteen pounds of oatmeal, ten pounds of wheat-flour, fifteen pounds of pease and beans, twenty pounds of potatoes, one pint of vinegar, sixty gallons of fresh

water, ten pounds of salt pork, and ten pounds of salt beef, free of bone, all to be of good quality. At places where either rice, oatmeal, wheat-flour, or pease and beans cannot be procured, of good quality and on reasonable terms, the quantity of either or any of the other last-named articles may be increased and substituted therefor; and, in case potatoes cannot be procured on reasonable terms, one pound of either of such articles may be substituted in lieu of five pounds of potatoes. The master of such vessels shall deliver to each passenger at least one-tenth part of such provisions weekly, commencing on the day of sailing, and at least three quarts of water daily.

SEC. 4261. If the passengers on board of any such vessel in which the provisions and water shall not have been provided as required by the preceding section, shall, at any time, be put on short allowance during any voyage, the master or owner of any such vessel shall pay to each passenger put on short allowance the sum of three dollars for each and every day such passenger may have been put on short allowance, to be recovered in the circuit or district court of the United States.

Penalty for failure to provide provisions and water.
3 March, 1855, c. 213, s. 6, v. 10, p. 718.

SEC. 4262. It shall be the duty of the master of every vessel employed in transporting passengers between the United States and Europe to cause the food and provisions of all the passengers to be well and properly cooked, daily, and to be served out and distributed to them at regular and stated hours, by messes, or in such other manner as shall be deemed best and most conducive to the health and comfort of such passengers, of which hours and manner of distribution due and sufficient notice shall be given. Every master of any such vessel who willfully fails to furnish and distribute provisions in the quantity and cooked in the manner required by this Title shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars, and imprisoned for a term not exceeding one year. The enforcement of this penalty, however, shall not affect the civil responsibility of the master and owners to such passengers as may have suffered from such default.

Distribution of provisions.
3 March, 1855, c. 213, s. 6, v. 10, p. 717.

Discipline and
health.

3 March, 1855, c.
213, s. 7, v. 10, p.
718.

SEC. 4263. The master of any vessel employed in transporting passengers between the United States and Europe is authorized to maintain good discipline and such habits of cleanliness among passengers as will tend to the preservation and promotion of health; and to that end he shall cause such regulations as he may adopt for this purpose to be posted up, before sailing, on board such vessel, in a place accessible to such passengers, and shall keep the same so posted up during the voyage. Such master shall cause the apartments occupied by such passengers to be kept at all times in a clean, healthy state; and the owners of every such vessel so employed are required to construct the decks and all parts of the apartments so that they can be thoroughly cleansed; and also to provide a safe, convenient privy or water-closet for the exclusive use of every one hundred such passengers. The master shall also, when the weather is such that the passengers cannot be mustered on deck with their bedding, and at such other times as he may deem necessary, cause the deck occupied by such passengers to be cleansed with chloride of lime, or some other equally efficient disinfecting agent. And for each neglect or violation of any of the provisions of this section, the master and owner of any such vessel shall be severally liable to the United States in a penalty of fifty dollars, to be recovered in any circuit or district court within the jurisdiction of which such vessel may arrive, or from which she is about to depart, or at any place where the owner or master may be found.

Inspection of pas-
senger-vessel.

3 March, 1855, c.
213, s. 9, v. 10, p.
718.

SEC. 4264. The collector of the customs, at any port at which any vessel so employed shall arrive, or from which any such vessel shall be about to depart, shall appoint and direct one or more of the inspectors of the customs for such port to examine such vessel, and report in writing to him whether the requirements of law have been complied with in respect to such vessel; and if such report shall state such compliance, and shall be approved by such collector, it shall be deemed prima-facie evidence thereof. [See § 4272.]

SEC. 4265. Vessels bound from any port in the United States to any port or place in the Pacific Ocean, or on its tributaries, or from any such port or place to any port in the United States on the Atlantic, or its tributaries, including vessels whose passengers, or any part of them, shall be bound from or to any of those ports or places, by way of any overland route through Mexico or Central America, shall be subject to the foregoing provisions regulating the carriage of passengers in merchant-vessels; except so much as relates to food and water; but the owners and masters of such vessels shall in all cases furnish to each passenger the daily supply of water therein mentioned; and they shall furnish a sufficient supply of good and wholesome food, properly cooked; and in case they shall fail so to do, or shall provide unwholesome or unsuitable food, such masters or owners shall be liable to pay to each passenger the sum of three dollars for each day on which such failure or wrongful act is committed, to be recovered in the circuit or district court of the United States.

Vessels bound to or from the Pacific Ocean.

3 March, 1855, c. 213, s. 11, v. 10, p. 719.

4 July, 1864, c. 249, s. 2, v. 13, p. 390.

SEC. 4266. The master of any vessel arriving in the United States, or any of the Territories thereof, from any foreign place whatever, at the same time that he delivers a manifest of the cargo, and if there be no cargo, then at the time of making report or entry of the vessel, pursuant to law, shall also deliver and report to the collector of the district in which such vessel shall arrive a list of all the passengers taken on board of the vessel at any foreign port or place; in which list he shall designate particularly the age, sex, and occupation of the passengers respectively, the part of the vessel occupied by each during the voyage, and country to which they severally belong, and that of which it is their intention to become inhabitants; and shall further set forth whether any and what number have died on the voyage; such list shall be sworn to by the master, in the same manner as directed by law in relation to the manifest of the cargo; and the refusal or neglect of the master to comply with the provisions of this section, or any part thereof, shall incur the same penalties, disabilities, and forfeitures as are

Lists of passengers.

3 March, 1855, c. 213, s. 12, v. 10, p. 719.

provided for a refusal or neglect to report and deliver a manifest of the cargo. [See §§ 2774, 2807-2815.]

Copies to be returned to Secretary of State.

3 March, 1855, c. 213, s. 13.

SEC. 4267. Every collector of the customs to whom such lists of passengers shall be delivered, shall quarter-yearly return copies thereof to the Secretary of State.

Payment in case of death of passenger.

3 March, 1855, c. 213, s. 14, v. 10, p. 719.

SEC. 4268. In case there shall have occurred on board any vessel arriving at any port or place within the United States, or its Territories, any death among the passengers, other than cabin passengers, the master, or owner, or consignee of such vessel shall, within twenty-four hours after the time within which the report and list of passengers is required to be delivered to the collector of the customs, pay to the collector the sum of ten dollars for each and every passenger above the age of eight years who shall have died on the voyage by natural disease. The collector shall pay the money thus received, at such times and in such manner as the Secretary of the Treasury, by general rules, shall direct, to any board or commission appointed by and acting under the authority of the State within which the port where such vessel arrived is situated, for the care and protection of sick, indigent, or destitute emigrants, to be applied to the objects of their appointment; and if there be more than one board or commission who shall claim such payment, the Secretary of the Treasury shall determine which is entitled to receive the same, and his decision in the premises shall be final and without appeal; but such payment shall in no case be awarded or made to any board, or commission, or association formed for the protection or advancement of any particular class of emigrants, or emigrants of any particular nation or creed.

Penalty for refusal to pay.

3 March, 1855, c. 213, s. 14, v. 10, p. 720.

SEC. 4269. Every master, owner, or consignee of any vessel, who refuses or neglects to pay to the collector any sum of money required, within the time prescribed by the preceding section, shall be liable to a penalty of fifty dollars, in addition to such sum of ten dollars, for each passenger upon whose death the same has become payable, to be recovered by the United States in any circuit or district court of the United States where such vessel may arrive, or such master, owner, or consignee may reside; and the money shall be disposed of in the

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same manner as is directed with respect to the sums required to be paid to the collector of customs.

SEC. 4270. The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant-vessels shall be liens on the vessel violating those provisions, and such vessels shall be libeled therefor in any circuit or district court of the United States where such vessel shall arrive. [See § 629.]

Recovery of penalties.

3 March, 1855, c. 213, s. 15.

SEC. 4271. Any vessel which may be employed by the American Colonization Society, or the colonization society of any State, to transport, and which shall actually transport, from any port of the United States to any colony on the west coast of Africa, colored emigrants, to reside there, shall be subject to the operation of the foregoing provisions regulating the carriage of passengers in merchant vessels.

Vessels belonging to colonization societies.

Ibid., s. 16.

SEC. 4272. The collector of the customs shall examine each emigrant-vessel, on its arrival at his port, and ascertain and report to the Secretary of the Treasury the time of sailing, the length of the voyage, the ventilation, the number of passengers, their space on board, their food, the native country of the emigrants, the number of deaths, the age and sex of those who died during the voyage; together with his opinion of the cause of the mortality, if any, on board, and, if none, what precautionary measures, arrangements, or habits are supposed to have had any, and what, agency in causing the exemption.

Examination of emigrant-vessels by collector.

Ibid., s. 17.

SEC. 4273. Informers shall be entitled to one-half of any penalty or fine collected under the provisions relating to the transportation of passengers in vessels to or from any foreign port or place other than foreign contiguous country, upon their information.

Informers.

4 July, 1864, c. 249, s. 9, v. 13, p. 392.

SEC. 4274. The provisions of this Title relating to the transportation of passengers between the United States and any port other than foreign contiguous territory, except such as relate to lists or manifests of passengers, shall apply to all vessels owned, in whole or in part, by citizens of the United States, and registered, enrolled, or licensed within the United States, and to all masters thereof carrying passengers or intend-

Vessels carrying passengers without the United States.

19 Feb., 1862, c. 27, s. 5, v. 12, p. 341.

ing to carry passengers from any foreign port without the United States to any other foreign port without the United States, and all the penalties and forfeitures provided for in such provisions shall apply to such vessels and masters.

Penalty upon visiting part of vessel assigned to emigrants.

24 March, 1860, c. 8, s. 2, v. 12, p. 3.

SEC. 4275. Neither the officers, seamen, nor other persons employed on board of any vessel bringing emigrant passengers to the United States, or any of them, shall visit or frequent any part of such vessel assigned to emigrant passengers, except by the direction or permission of the master of such vessel first made or given for such purpose. Every officer, seaman, or other person employed on board of such vessel who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall forfeit to the vessel his wages for the voyage of the vessel during which the offense has been committed. [See §§ 5349-5351.]

Penalty for permitting officers or seamen to visit such part of vessel.

Ibid.

SEC. 4276. Every master who directs or permits any officer or seaman or other person employed on board of any vessel to visit or frequent any part of such vessel assigned to emigrant passengers, except for the purpose of doing or performing some necessary act or duty as an officer, seaman, or other person employed on board of the vessel, shall be deemed guilty of a misdemeanor, and shall be punishable by a fine of fifty dollars for each occasion on which he so directs or permits the provisions of this section to be violated by any officer, seaman, or other person employed on board of such vessel.

Notice to be posted in emigrant-vessels.

24 March, 1860, c. 8, s. 3, v. 12, p. 4.

SEC. 4277. The master of every vessel bringing emigrant passengers to the United States shall post a written or printed notice in the English, French, and German languages containing the provisions of the two preceding sections in a conspicuous place on the fore-castle, and in the several parts of the vessel assigned to emigrant passengers, and keep the same so posted during the voyage; and if he neglects so to do, he shall be deemed guilty of a misdemeanor, and shall be punishable by a fine of not more than five hundred dollars.

Transportation of nitro-glycerine.

3 July, 1866, c. 162, s. 1, v. 14, p. 81.

SEC. 4278. It shall not be lawful to transport, carry, or convey, ship, deliver on board, or cause to be delivered on board, the substance or article known or desig-

nated as nitro-glycerine or glynoil oil, nitroileum or blasting oil, or nitrated oil, or powder mixed with any such oil, or fiber saturated with any such article or substance, upon or in any vessel or vehicle used or employed in transporting passengers by land or water between a place in any foreign country and a place within the limits of any State, Territory, or district of the United States, or between a place in one State, Territory, or district of the United States, and a place in any other State, Territory, or district thereof. [See §§ 5353-5355.]

SEC. 4279. It shall not be lawful to ship, send, or forward any quantity of the substances or articles named in the preceding section, or to transport, convey, or carry the same by a vessel or vehicle of any description, upon land or water, between a place in a foreign country and a place within the United States, or between a place in one State, Territory, or district of the United States and a place in any other State, Territory, or district thereof, unless the same shall be securely inclosed, deposited, or packed in a metallic vessel surrounded by plaster of Paris, or other material that will be non-explosive when saturated with such oil or substance, and separate from all other substances, and the outside of the package containing the same be marked, printed, or labeled in a conspicuous manner with the words "Nitro-glycerine, dangerous."

Packing and marking nitro-glycerine.

3 July, 1866, c. 162, s. 3, v. 14, p. 82.

SEC. 4280. The two preceding sections shall not be so construed as to prevent any State, Territory, district, city, or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances, between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits, for sale, use, or consumption therein.

[See § 5355.]
Regulation by States of traffic in nitro-glycerine.

Ibid., s. 5.

SEC. 4281. If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver

Liability of masters, etc., as carriers.

28 Feb., 1877, c. 109, s. 69, v. 16, p. 458.

plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

Loss by fire.

3 March, 1851, c. 43, s. 1, v. 9, p. 635.

Walker vs. Transportation Co., 3 Wall., 150.

SEC. 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

Liability of owner not to exceed his interest.

Ibid., s. 3.

Norwich Co. vs. Wright, 13 Wall., 104; *Allen vs. MacKay*, 1 Sprague, 219.

SEC. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

General average of losses.

3 March, 1851, c. 43, s. 4, v. 9, p. 635.

Norwich Co. vs. Wright, 13 Wall., 104; *The Steamboat City of Norwich*, 1 Ben., 89.

SEC. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel, in proportion to their respective losses; and for that purpose the freighters and owner of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of

apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

SEC. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

Transfer of interest of owner to trustee.

3 March, 1851, c. 43, s. 4, v. 9, p. 635.

Norwich Co. vs. Wright, 13 Wall, 104.

SEC. 4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

When charterer is deemed owner.

Ibid., s. 5, p. 636.

Thorp vs. Hammond, 12 Wall, 408.

SEC. 4287. Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

Remedies reserved.

Ibid., s. 6.

SEC. 4288. Any person shipping oil of vitriol, unslaked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation.

Shipping inflammable materials.

Ibid., s. 7.

Exception to limitation of liability.

3 March, 1851, c. 43, s. 7.

Propeller Niagara vs. Cordes, 21 How., 26; Moore vs. Transportation Co., 24 How., 1.

SEC. 4289. The provisions of this Title relating to the limitation of the liability of the owners of vessels shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.

CHAPTER TWO.

TRANSPORTATION OF PASSENGERS AND MERCHANDISE.

Sec.	Sec.
4463. Officers and crew of passenger-steamers.	4484. Stairways and gangways on river-steamers carrying passengers on main deck.
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4473. Penalty for unlawfully carrying cotton or hemp.	4494. Two copies of this Title to be kept on each passenger-steamer.
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4481. Boats for river-steamers.	
4482. Life-preservers for river-steamers carrying passengers.	
4483. Fire-buckets, axes, etc., for river-steamers carrying passengers.	

Officers and crew of passenger-steamers.

28 Feb., 1871, c. 100, s. 14, v. 16, p. 446.

SEC. 4463. No steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers and full

crew, sufficient at all times to manage the vessel, including the proper number of watchmen. But if any such vessel, on her voyage, is deprived of the services of any licensed officer, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the deficiency may be temporarily supplied, until others licensed can be obtained.

SEC. 4464. The inspectors shall state in every certificate of inspection granted to steamers carrying passengers, other than ferry-boats, the number of passengers of each class that any such steamer has accommodations for, and can carry with prudence and safety.

Number of passengers allowable.
28 Feb., 1871, c. 100, s. 48, p. 454.

SEC. 4465. It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection; and for every violation of this provision the master or owner shall be liable, to any person suing for the same, to forfeit the amount of passage-money and ten dollars for each passenger beyond the number allowed.

Penalty for carrying too great a number of passengers.
Ibid.

SEC. 4466. If any passenger-steamer engages in excursions, the inspectors shall issue to such steamer a special permit, in writing, for the occasion, in which shall be stated the additional number of passengers that may be carried, and the number and kind of life-saving appliances that shall be provided for the safety of such additional passengers; and they shall also, in their discretion, limit the route and distance for such excursions.

Special permit for excursions.
Ibid.

SEC. 4467. The master of every passenger-steamer shall keep a correct list of all the passengers received and delivered from day to day, noting the places where received and where landed, which record shall be opened to the inspection of the inspectors and officers of the customs at all times; and the aggregate number of passengers shall be furnished to inspectors as often as called for; but on routes not exceeding one hundred miles, the number of passengers, if kept, shall be sufficient.

Lists of passengers.
Ibid., s. 49.

SEC. 4468. Every master of any passenger-steamer who fails, through negligence or design, to keep a list of passengers, as required by the preceding section, shall be liable to a penalty of one hundred dollars.

Penalty for failure to keep passenger list.
Ibid.

Recovery of penalties.

28 Feb., 1871, c.
100, s. 49.

SEC. 4469. The penalties imposed by sections forty-four hundred and sixty-five and forty-four hundred and sixty-eight shall be a lien upon the vessel in each case, but a bond may, as provided in other cases, be given to secure the satisfaction of the judgment.

Precautions against fire.

Ibid., s. 2, p. 440.

SEC. 4470. Every steamer carrying passengers or freight shall be provided with suitable pipes and valves attached to the boiler, to convey steam into the hold and the different compartments thereof, to extinguish fire; and every stove used on board of any such vessel shall be well and securely fastened, so as to prevent it from being moved or overthrown, and all wood-work or other ignitable substances about the boilers, chimneys, cook-houses, and stove-pipes exposed to ignition, shall be thoroughly shielded by some incombustible material, in such a manner as to leave the air to circulate freely between such material and wood-work or other ignitable substance; and before granting a certificate of inspection, the inspector shall require all other necessary provisions to be made throughout such vessels to guard against loss or danger from fire.

Fire-pumps and hose.

Ibid., s. 3.

SEC. 4471. Every steamer permitted by her certificate of inspection to carry as many as fifty passengers, or upward, and every steamer carrying passengers, which also carries cotton, hay, or hemp, shall be provided with a good double-acting steam fire-pump, or other equivalent apparatus for throwing water. Such pump or other apparatus for throwing water shall be kept at all times and at all seasons of the year in good order and ready for immediate use, having at least two pipes of suitable dimensions, one on each side of the vessel, to convey the water to the upper decks, to which pipes there shall be attached, by means of stop-cocks or valves, both between decks and on the upper deck, good and suitable hose of sufficient strength to stand a pressure of not less than one hundred pounds to the square inch, long enough to reach to all parts of the vessel and properly provided with nozzles, and kept in good order and ready for immediate service. Every steamer exceeding two hundred tons burden and carrying passengers shall be provided with two good double-acting fire-pumps, to be worked by hand; each chamber of

such pumps, except pumps upon steamers in service on the twenty-eighth day of February, eighteen hundred and seventy-one, shall be of sufficient capacity to contain not less than one hundred cubic inches of water; and such pumps shall be placed in the most suitable parts of the vessel for efficient service, having suitable well-fitted hose to each pump, of at least one-half the vessel in length, kept at all times in perfect order, and shipped up and ready for immediate use. On every steamer not exceeding two hundred tons, one of such pumps may be dispensed with. Each fire-pump thus prescribed shall be supplied with water by means of a suitable pipe connected therewith, and passing through the side of the vessel so low as to be at all times under water when she is afloat; and no fire-pump thus provided for shall be placed below the lower deck of the vessel. Every steamer shall also be provided with a pump which shall be of sufficient strength and suitably arranged to test the boilers thereof.

SEC. 4472. No loose hay, loose cotton, or loose hemp, camphene, nitro-glycerine, naphtha, benzine, benzole, coal-oil, crude or refined petroleum, or other like explosive burning fluids, or like dangerous articles, shall be carried as freight or used as stores on any steamer carrying passengers; nor shall baled cotton or hemp be carried on such steamers unless the bales are compactly pressed and thoroughly covered with bagging of similar fabric, and secured with good rope or iron bands; nor shall gunpowder be carried on any such vessel, except under special license; nor shall oil of vitriol, nitric or other chemical acids be carried on such steamers except on the decks or guards thereof, or in such other safe part of the vessel as shall be prescribed by the inspectors. Refined petroleum, which will not ignite at a temperature less than one hundred and ten degrees of Fahrenheit thermometer, may be carried on board such steamers upon routes where there is no other practical mode of transporting it, and under such regulations as shall be prescribed by the board of supervising inspectors with the approval of the Secretary of the Treasury; and oil or spirits of turpentine may be carried on such steamers

Dangerous articles not to be carried on passenger-steamers.

28 Feb., 1871, c. 100, s. 4, p. 441.

[See §§ 4278-4280, 5353-5355.]

when put up in good metallic vessels, or casks or barrels well and securely bound with iron and stowed in a secure part of the vessel; and friction-matches may be carried on such steamers when securely packed in strong tight chests or boxes, the covers of which shall be well secured by locks, screws, or other reliable fastenings, and stowed in a safe part of the vessel at a secure distance from any fire or heat. All such other provisions shall be made on every steamer carrying passengers or freight, to guard against and extinguish fire, as shall be prescribed by the board of supervising inspectors, and approved by the Secretary of the Treasury.

Penalty for unlawfully carrying cotton or hemp.

28 Feb., 1871, c. 100, s. 4, p. 441.

SEC. 4473. Every bale of cotton or hemp that shall be shipped or carried on any passenger-steamer, without conforming to the provisions of the preceding section, shall be subject to a penalty of five dollars, and shall be liable to seizure and sale to secure the payment of such penalty.

License for use of petroleum in the production of motive power.

Ibid., p. 442.

SEC. 4474. The Secretary of the Treasury may grant permission to the owner of any steam-vessel to use any invention or process for the utilization of petroleum or other mineral oils or substances in the production of motive-power, and may make and enforce regulations concerning the application and use of the same for such purpose. But no such permission shall be granted, unless upon the certificate of the supervising inspector of steamboats for the district wherein such vessel is registered, and other satisfactory proof that the use of the same is safe and efficient; and upon such proof, and the approval of such certificate by the Secretary of the Treasury, a special license for the use of such process or invention shall issue under the seal of the Treasury Department. [See § 4424.]

Mode of packing dangerous articles.

Ibid., s. 5.

SEC. 4475. All gunpowder, nitro-glycerine, camphene, naphtha, benzine, benzole, coal-oil, crude or refined petroleum, oil of vitriol, nitric or other chemical acids, oil or spirits of turpentine, friction-matches, and all other articles of like character, when packed or put up for shipment, shall be securely packed and put up separately from each other and from all other articles; and the package, box, cask, or other vessel containing the

same shall be distinctly marked on the outside, with the name or description of the article contained therein.

SEC. 4476. Every person who packs or puts up, or causes to be packed or put up for shipment, any gun-powder, nitro-glycerine, camphene, naphtha, benzine, benzole, coal-oil, crude or refined petroleum, oil of vitriol, nitric or other chemical acids, oil or spirits of turpentine, friction-matches, or other articles of like character, otherwise than as directed by the preceding section, or who knowingly ships or attempts to ship the same, or delivers the same to any such vessel as stores, unless duly packed and marked, shall be deemed guilty of a misdemeanor, and punished by fine not exceeding two thousand dollars, or imprisonment not exceeding eighteen months, or both; one-half of the fine to go to the informer, and the articles to be liable to seizure and forfeiture.

Punishment for unlawfully shipping dangerous articles.
28 Feb., 1871, c. 100, s. 5.

[See §§ 4278-4280, 5353-5355.]

SEC. 4477. Every steamer carrying passengers during the night-time shall keep a suitable number of watchmen in the cabins, and on each deck, to guard against fire or other dangers, and to give alarm in case of accident or disaster.

Watchman on passenger-steamers.
Ibid., s. 6.

SEC. 4478. For any neglect to keep the watchman required by the preceding section, the license of the officer in charge of the vessel for the time being shall be revoked; and every owner of such vessel who neglects or refuses to furnish the number of men necessary to keep watch as required shall be fined one thousand dollars.

Punishment for failure to keep watchmen.
Ibid.

SEC. 4479. The board of supervising inspectors may require steamers carrying either passengers or freight to be provided with such number and kind of good and efficient portable fire-extinguishers as, in the judgment of the board, may be necessary to protect them from fire when such steamers are moored or lying at a wharf without steam to work the pumps.

Fire-extinguishers.
Ibid.

SEC. 4480. Every steamer carrying passengers shall be provided with wire tiller-ropes, or iron rods or chains, for the purpose of steering and navigating the vessel, and shall employ wire bell-pulls for signaling the engineer from the pilot-house, together with tubes of proper size so arranged as to return the sound of the

Wire tiller-ropes, bell-pulls, etc., for passenger-steamers.
Ibid., s. 10, p. 443.

engine-bells to the pilot-house, or other arrangement to repeat back the signal. But on any such vessel navigated by the mariners' compass, so much of such wire rope or chain may be dispensed with and disused as shall influence or disturb the working of the compass.

Boats for river-steamers.

28 Feb., 1871, c. 100, s. 7, p. 442.

SEC. 4481. Every steam-vessel navigating rivers only, except ferry-boats, freight-boats, canal-boats, and towing-boats, of less than fifty tons, shall have at least one good substantial boat with lines attached, and properly supplied with oars, and kept in good condition at all times, and ready for immediate use; and in addition thereto, every such vessel carrying passengers shall have one or more metallic life-boats, fire-proof, and in all respects good and substantial boats, of such dimensions and arrangements as the board of supervising inspectors by their regulations shall prescribe, which boats shall be carried in the most convenient manner to be brought into immediate use in case of accident. But where the character of the navigation is such that, in the opinion of the supervising inspector, the metallic life-boats can be dispensed with, he may exempt any such vessel from carrying the same; or may require a substitute therefor, at his discretion.

Life-preservers for river-steamers carrying passengers.

Ibid., s. 8, p. 443.

SEC. 4482. Every such steam-vessel carrying passengers shall also be provided with a good life-preserver, made of suitable material, for every cabin passenger for which she will have accommodation, and also a good life-preserver or float for each deck or other class passenger which the inspector's certificate shall allow her to carry, including the officers and crew; which life-preservers or floats shall be kept in convenient and accessible places on such vessel in readiness for immediate use in case of accident.

Fire-buckets, axes, etc., for river-steamers carrying passengers.

Ibid.

SEC. 4483. Every such steam-vessel carrying passengers, of two hundred tons burden or less, shall also keep at least eighteen fire-buckets and two water-barrels, and shall have not less than four axes; and every such steamer of over two hundred tons, and not less than five hundred tons burden, shall carry not less than twenty-four buckets, four water-barrels, and six axes; and every such steamer of over five hundred

tons shall carry not less than thirty-five buckets, six water-barrels, and eight axes. The buckets and barrels shall be kept in convenient places and filled with water, to be in readiness in case of fire, and the axes shall be kept in good order and ready for immediate use. Tanks of suitable dimensions and arrangement, or buckets in sufficient number, may be substituted for barrels.

SEC. 4484. Every such steam-vessel carrying passengers on the main-deck shall be provided with permanent stairways and other sufficient means, convenient to the passengers, for their escape to the upper deck, in case of the vessel sinking or of other accident endangering life; and in the stowage of freight upon such deck, where passengers are carried, gangways or passages, sufficiently large to allow persons to pass freely through them, shall be left open both fore and aft of the vessel, and also to and along the guards on each side.

SEC. 4485. The captain or mate of every such steam-vessel carrying passengers upon the main-deck shall assign to all deck-passengers, when taking passage, the space on deck they may occupy during the voyage, and such space shall not thereafter be occupied by freight, nor over-crowded by other persons, nor shall freight be stowed about the boilers or machinery, in such a manner as to obstruct or prevent the engineer from readily attending to his duties.

SEC. 4486. For every violation of the provisions of the two preceding sections the owners of the vessel shall be punished by a fine of three hundred dollars.

SEC. 4487. On any steamers navigating rivers only, when, from darkness, fog, or other cause, the pilot or watch shall be of opinion that the navigation is unsafe, or, from accident to or derangement of the machinery of the boat, the chief engineer shall be of the opinion that the further navigation of the vessel is unsafe, the vessel shall be brought to anchor, or moored as soon as it can prudently be done: *Provided*, That if the person in command shall, after being so admonished by either of such officers, elect to pursue such voyage, he may do the same; but in such case both he and the owners of such steamer shall be answerable for all

Stairways and gangways on river-steamers carrying passengers on main-deck.

28 Feb., 1871, c. 100, s. 9.

Accommodation of deck-passengers.

Ibid.

Penalty for not providing proper accommodations for passengers.

Ibid.

River-steamers to be anchored when navigation is unsafe.

Ibid., s. 42, p. 453.

damages which shall arise to the person of any passenger, or his baggage, from such causes in so pursuing the voyage, and no degree of care or diligence shall in such case be held to justify or excuse the person in command, or the owners.

Life-boats, etc.,
on ocean, lake, and
sound steamers,

28 Feb., 1871, c.
100, s. 52, p. 455.

SEC. 4488. Every steamer navigating the ocean, or any lake, bay, or sound of the United States, shall be provided with such numbers of life-boats, floats, rafts, life-preservers, and drags, as will best secure the safety of all persons on board such vessel in case of disaster; and every sea-going vessel carrying passengers, and every such vessel navigating any of the northern or northwestern lakes, shall have the life-boats required by law, provided with suitable boat-disengaging apparatus, so arranged as to allow such boats to be safely launched while such vessels are under speed or otherwise, and so as to allow such disengaging apparatus to be operated by one person, disengaging both ends of the boat simultaneously from the tackles by which it may be lowered to the water. And the board of supervising inspectors shall fix and determine, by their rules and regulations, the kind of life-boats, floats, rafts, life-preservers, and drags that shall be used on such vessels, and also the kind and capacity of pumps or other appliances for freeing the steamer from water in case of heavy leakage, the capacity of such pumps or appliances being suited to the navigation in which the steamer is employed.

Penalty for failure to provide life-boats, etc.

Ibid.

SEC. 4489. The owner of any such steamer who neglects or refuses to provide such life-boats, floats, rafts, life-preservers, drags, pumps, or appliances, as are, under the provisions of the preceding section, required by the board of supervising inspectors, and approved by the Secretary of the Treasury, shall be fined one thousand dollars.

Water-tight bulk-heads in lake steamers carrying passengers.

Ibid., s. 53.

SEC. 4490. Every sea-going steamer, and every steamer navigating the great northern or northwestern lakes, carrying passengers, the building of which shall be completed after the twenty-eighth day of August, eighteen hundred and seventy-one, shall have not less than three watertight cross-bulk-heads, such bulk-heads to reach to the main-deck in single-decked ves-

sels, otherwise to the deck next below the main-deck ; to be made of iron plates, sustained upon suitable frame-work ; and to be properly secured to the hull of the vessel. The position of such bulk-heads and the strength of material of which the same shall be constructed shall be determined by the general rules of the board of supervising inspectors.

SEC. 4491. No kind of instrument, machine, or equipment, for the better security of life, provided for by this Title, shall be used on any steam-vessel which shall not first be approved by the board of supervising inspectors, and also by the Secretary of the Treasury.

Use of instruments for security of life.

28 Feb., 1871, c. 100, s. 11, p. 445.

SEC. 4492. Every barge carrying passengers, while in tow of any steamer, shall be subject to the provisions of this Title relating to fire-buckets, axes, life-preservers, and yawls, to such extent as shall be prescribed by the board of supervising inspectors ; and for any violation of this section the penalty shall be two hundred dollars, recoverable one-half for the use of the informer.

Barges carrying passengers.

Ibid., s. 46, p. 453.

SEC. 4493. Whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured, to the full amount of damages if it happens through any neglect or failure to comply with the provisions of this Title, or through known defects or imperfections of the steaming apparatus or of the hull ; and any persons sustaining loss or injury through the carelessness, negligence, or willful misconduct of any master, mate, engineer, or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot, and recover damages for any such injury caused by any such master, mate, engineer, or pilot. [See § 5344.]

Liability of master and owners for damage to passengers.

Ibid., s. 43.

SEC. 4494. Every master or commander of any steam-vessel carrying passengers shall keep on board of such vessel at least two copies of the provisions of this Title, to be furnished to him by the Secretary of the Treasury ; and if the master or commander neglects or refuses to do so, or shall unreasonably refuse to exhibit a copy of

Two copies of this Title to be kept on each passenger-steamer.

Ibid., s. 50, p. 445.

the same to any passenger who asks for it, he shall be liable to a penalty of twenty dollars.

Name of steamer
to be exhibited.

28 Feb., 1871, c.
100, s. 50, p. 455.

SEC. 4495. Every steam-vessel of the United States, in addition to having her name painted on her stern, shall have the same conspicuously placed in distinct, plain letters, of not less than six inches in length, on each outer side of the pilot-house, if it has such, and in case the vessel has side-wheels, also on the outer side of each wheel-house; and if any such steamboat be found without having her name placed as required, she shall be subject to the same penalty and forfeiture as provided by law in the case of a vessel of the United States found without having her name, and the name of the port to which she belongs, painted on her stern.

Duties of customs
officers.

Ibid., s. 30, p. 450.

SEC. 4496. All collectors, or other chief officers of the customs, and all inspectors within the several districts, shall enforce the provisions of this Title against all steamers arriving and departing.

Penalty for omis-
sion of duty by cus-
toms officer.

Ibid.

SEC. 4497. Every collector, or other chief officer of the customs, or inspector, who negligently or intentionally omits any duty under the preceding section, shall be liable to removal from office, and to a penalty of one hundred dollars for each offense, to be sued for in an action of debt.

Registry, enroll-
ment, etc., denied
to vessels not com-
plying with the law.

Ibid., s. 1, p. 440.

SEC. 4498. No license, register, or enrollment shall be granted, nor any other papers be issued, by any collector or other chief officer of the customs, to any vessel propelled in whole or in part by steam, until he shall have satisfactory evidence that all the provisions of this Title have been fully complied with.

Penalty for fail-
ure to comply.

Ibid.

SEC. 4499. If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this Title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.

Penalty in cases
not provided for.

Ibid., s. 68, p. 458.

SEC. 4500. The penalty for the violation of any provision of this Title, not otherwise specially provided for, shall be a fine of five hundred dollars, recoverable one-half for the use of the informer.

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